

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-4112

United States Court of Appeals

FOR THE SECOND CIRCUIT

ESTATE OF LUDWIG NEUGASS, Deceased, HERBERT MARX,
JACQUES COE, JR. and CHASE MANHATTAN BANK, N.A.,
Executors,

Petitioners-Appellants,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

JOINT APPENDIX

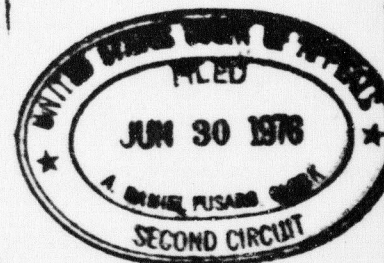
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PAGINATION AS IN ORIGINAL COPY

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Docket Entries
UNITED STATES TAX COURT
GENERAL DOCKET

DOCKET NO. 4734-73

ESTATE OF LUDWIG NEUGASS, DECEASED,
HERBERT MARX, JACQUES COE, JR., AND
CHASE MANHATTAN BANK, N.A., EXECUTORS
Herbert: 325 West 86th St., New York, N.Y.
Jacques: 3 Wakenan Pl., Larchmont, N.Y.
Bank: 1 Chase Manhattan Place
New York, N.Y.
vs.

APPEARANCES FOR PETITIONER:

Alan S. Rosenberg (Proskauer, Rose,
& Mendelsohn), 300 Park Ave., New York,
N.Y., N. Y. 10022

ADDRESS

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

Date Month Day Year	Filings and Proceedings	Action	Served
June 21, 1973	PETITION FILED: FEE PAID	June 21, 1973	June 25, 1973
June 21, 1973	REQUEST by Petr. for trial at New York, N.Y.	GRANTED June 25, 1973	June 25, 1973
Aug. 20, 1973	ANSWER by Resp. filed.		Aug. 21, 1973
Oct. 21, 1974	NOTICE OF TRIAL on Jan. 20, 1975 at New York, N.Y.		Oct. 21, 1974
Jan. 20, 23, 1975	TRIAL at New York, N.Y. before Judge Featherston.		
	Stipulation of facts with attached exhibits A, 1, 2, 3, & 4 filed Jan. 23, 1975.		
	ORIGINAL BRIEFS DUE: Mar. 10, 1975		
	REPLY BRIEFS DUE: Apr. 8, 1975		
	SUBMITTED TO JUDGE FEATHERSTON		
Feb. 11, 1975	TRANSCRIPT of Jan. 23, 1975 received.		
March 4, 1975	MOTION by Resp. to extend time to March 24, 1975 within which to file Brief. (No Obj. Petr.)	GRANTED March 5, 1975	MAR 6 1975
Mar. 24, 1975	BRIEF for Resp. filed.		MAR 27 1975
Mar. 26, 1975	BRIEF for Petr. filed. (P.M. Timely)		MAR 27 1975
Apr. 22, 1975	REPLY BRIEF for Respondent filed.		APR 24 1975
Apr. 24, 1975	REPLY BRIEF for Petitioners filed. (p.m. timely)		APR 24 1975
Aug. 18, 1975	MOTION by Resp. to extend time to Sept. 15, 1975 within which to file Supplemental Briefs. (No Obj. Petr.)	GRANTED Aug. 20, 1975	AUG 20 1975
	continued to page 2		

DOCKET NO. 4734-73

[illegible]

3a
Petition

UNITED STATES TAX COURT

ESTATE OF LUDWIG NEUGASS, deceased,)	
HERBERT MARX, JACQUES COE, JR. and)	
CHASE MANHATTAN BANK, N.A., Executors,)	
)	
Petitioners,)	Docket No.
)	
v.)	
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing Service symbols Form L-50 AD AP:NY:JPC:RR) dated March 29, 1973, and as the basis for their case allege as follows:

1. The petitioners, HERBERT MARX, an individual with his legal residence at 325 West 86th Street, New York, New York, JACQUES COE, JR., an individual with his legal

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Petition

residence at 3 Wakeman Place, Larchmont, New York and CHASE MANHATTAN BANK, N.A., a corporation with its principal office at 1 Chase Manhattan Plaza, New York, New York, are the duly qualified Executors of the Last Will and Testament of LUDWIG NEUGASS, deceased, who died a resident of New York County, New York, on February 24, 1969. Petitioners' principal office is c/o Chase Manhattan Bank, N.A., 1 Chase Manhattan Plaza, New York, New York 10005. The estate tax return here involved was filed with the District Director of Internal Revenue for the District of Manhattan, New York.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to one of the petitioners on March 29, 1973.

3. The deficiency as determined by the Commissioner is in estate tax on the decedent's estate in the amount of \$249,231.31, all of which is in dispute, together with an amount of refund to be determined at the conclusion of this proceeding.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Inclusion in the gross estate of \$25,385 as an increase over the returned value of Meissen porcelains owned by the

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Petition

decedent at the date of his death.

(b) Inclusion in the gross estate of \$257,300 as an increase over the returned value of paintings owned by the decedent at the date of his death.

(c) Decrease of the marital deduction by \$337,329.88 (or such greater or lesser amount as may be determined in this proceeding), on the alleged ground that the interest of the surviving spouse in the above mentioned Meissen procelains and paintings as of the date of the decedent's death was a terminable interest.

(d) Failure to allow a deduction from the gross estate for additional attorney's fees and miscellaneous expenses incurred or to be incurred in connection with the administration of the estate and in this proceeding, but not yet paid.

(e) Failure to allow credit for estate tax paid or to be paid by the estate to the State of New York in the amount of \$48,410.35, said amount being subject to adjustment by reason of any increase or decrease in the taxable estate as finally

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Petition

determined in this proceeding.

5. The facts upon which the petitioners rely as the basis of this case are as follows:

(a) LUDWIG NEUGASS (hereinafter referred to as the decedent) died on February 24, 1969, and at the date of his death was a citizen of the United States, and a resident of New York City, New York County, New York.

(b) Petitioners elected to have decedent's gross estate valued in accordance with values as of the date or dates subsequent to the decedent's death as authorized by Section 2032 of the Internal Revenue Code of 1954.

(c) Decedent owned Meissen porcelains on the date of his death.

(d) Based on all the facts and circumstances, the fair market value of the aforesaid Meissen porcelains, on the alternate valuation date, was \$50,770.

(e) Decedent owned paintings on the date of his death.

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Petition

(f) Based on all the facts and circumstances, the fair market value of the aforesaid paintings, on the alternate valuation date, was \$583,525.

(g) The estate will pay attorneys' fees and disbursements to PROSKAUER ROSE GOETZ & MENDELSON of New York, New York, for legal services rendered and to be rendered by said firm in connection with the administration of the estate and in this proceeding, and petitioners claim the right to deduct the full amount of said fees (such amount may be in excess of the amount reflected on the United States Estate Tax Return, Form 706, as originally filed), the amount of such deduction to be determined at the conclusion of this proceeding.

(h) Petitioners will incur and pay miscellaneous expenses in connection with the administration of the estate in addition to those heretofore incurred and paid, and petitioners claim the right to deduct the full amount of said expenses, the amount of such deduction to be determined at the conclusion of this proceeding.

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Petition

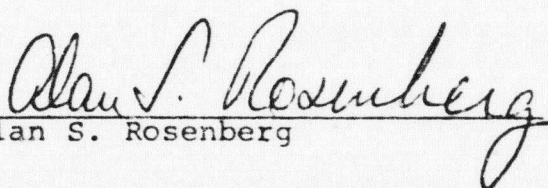
(i) Under Article FIFTH of decedent's Will, decedent bequeathed his entire art collection to his spouse, which bequest qualifies for the marital deduction under Section 2056 of the Internal Revenue Code of 1954, in that (i) the decedent was survived by his spouse, (ii) the entire art collection passed from the decedent to his spouse, and (iii) the property interest that passed from decedent to his spouse is a deductible interest under Treasury Regulations Section 20.2056(a)-2.

(j) The property interest that passed from the decedent to his spouse is not a "terminable interest" as defined in Treasury Regulations Section 20.2056(b)-1(b).

(k) Estate taxes have been paid or will be paid to the State of New York for the full amount allowable under the Internal Revenue Code of 1954 within the period set forth in Section 2011(c) thereof, and petitioners claim the right to the allowance of credit against the estate tax for the full amount of said New York estate taxes.

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Petition

WHEREFORE, the petitioners pray that this Court may try this case, determine that there is no deficiency in Federal estate tax due from these petitioners, and determine that there is a refund for Federal estate tax due to these petitioners, and grant such other and further relief as may be proper in the premises.


Alan S. Rosenberg

Counsel for Petitioners
PROSKAUER ROSE GOETZ & MENDELSON
300 Park Avenue
New York, New York 10022

STATE OF NEW YORK)
 : ss.:
 COUNTY OF NEW YORK)

Zoran Milkovich , being duly sworn, says that he is a ~~Trust Officer~~ of Chase Manhattan Bank, N.A., one of the Petitioners above named and an Executor, and is duly authorized to verify the foregoing Petition; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

Zoran Milkovich

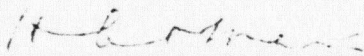
Subscribed and sworn to
 before me this 18th day
 of June, 1973

Virginia M. White

VIRGINIA M. WHITE
 NOTARY PUBLIC, State of New York
 No. 03 4249470
 Qualified in Bronx County
 Certificate Filed in New York County
 Commission Expires March 20, 1975

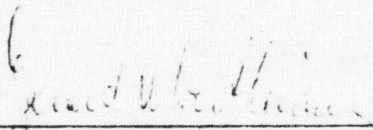
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

HERBERT MARX, being duly sworn, says that he is one of the Petitioners above named and an Executor duly authorized to verify the foregoing Petition; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.



Herbert Marx

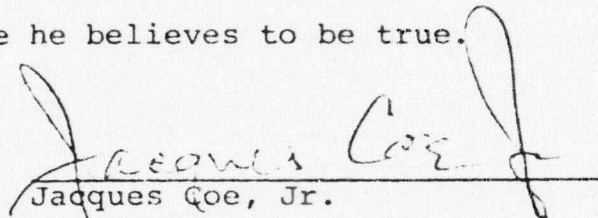
Subscribed and sworn to
before me this 18th day
of June, 1973



GERARD A. WERTHEIMER
Notary Public, State of New York
No. 30-1027250
Qualified in Nassau County
Commission Expires March 30, 1975

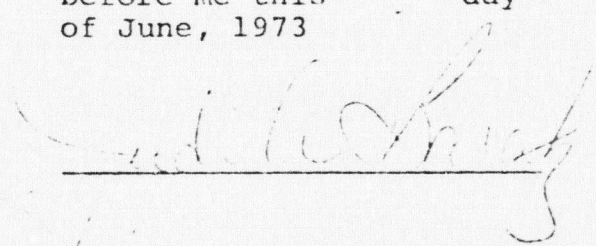
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JACQUES COE, JR., being duly sworn, says that he is one of the Petitioners above named and an Executor duly authorized to verify the foregoing Petition; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.



Jacques Coe, Jr.

Subscribed and sworn to
before me this day
of June, 1973



13a

Answer

UNITED STATES TAX COURT

ESTATE OF LUDWIG NEUGASS, deceased,)
HERBERT MARX, JACQUES COE, JR. and)
CHASE MANHATTAN BANK, N.A., Executors,)

Petitioners,)

v.)

COMMISSIONER OF INTERNAL REVENUE,)

Respondent.)

FILED

1973 AUG 20 PM 3 24

UNITED STATES
TAX COURT

Docket No. 4734-73

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled case, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 1 of the petition.

2. Admits that the notice of deficiency, a copy of which is attached to the petition and marked Exhibit A, was mailed on March 29, 1973. Denies the remaining allegations of paragraph 2 of the petition. Alleges that the notice of deficiency was mailed to petitioners in accordance with the direction contained in a power of attorney submitted to respondent.

3. Admits that the deficiency as determined by the Commissioner is in estate tax in the amount of \$249,231.31. Denies the remaining allegations of paragraph 3 of the petition.

4. (a) to (e), inclusive. Denies that the respondent erred as alleged in subparagraphs (a) to (e), inclusive, of

SERVED AUG 21 1973

paragraph 4 of the petition.

5. (a) to (c), inclusive. Admits the allegations of subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

(d) Denies the allegations of subparagraph (d) of paragraph 5 of the petition.

(e) Admits the allegations of subparagraph (e) of paragraph 5 of the petition.

(f) Denies the allegations of subparagraph (f) of paragraph 5 of the petition.

(g) and (h) Admits that petitioners claim the right to deduct attorneys' fees and miscellaneous expenses. Denies the remaining allegations of subparagraphs (g) and (h) of paragraph 5 of the petition.

(i) and (j) Denies the allegations of subparagraphs (i) and (j) of paragraph 5 of the petition.

(k) Admits that petitioners claim the right to the allowance of credit against the estate tax for New York estate taxes paid or to be paid. Denies the remaining allegations of subparagraph (k) of paragraph 5 of the petition.

6. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

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Answer

WHEREFORE, it is prayed that the deficiency determined
by the respondent be in all respects approved.

(Sgd) LAWRENCE B. GIBBS - CCMJr.

LAWRENCE B. GIBBS,
Acting Chief Counsel,
Internal Revenue Service.

OF COUNSEL:

MARVIN E. HAGEN,
Regional Counsel,
AGATHA L. VORSANGER,
Staff Assistant,
Internal Revenue Service,
26 Federal Plaza (12th Floor),
New York, New York 10007.

Stipulation of Facts

UNITED STATES TAX COURT

ESTATE OF LUDWIG NEUGASS, DECEASED,)
 HERBERT MARX, JACQUES COE, JR. and)
 CHASE MANHATTAN BANK, N.A., EXECUTORS,)

Petitioners,)

v.)

COMMISSIONER OF INTERNAL REVENUE,)

Respondent.)

Docket No. 4734-73

STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation and preserving the parties' rights to object, at the time of trial, to any and all portions of said stipulation and attached exhibits as they may deem irrelevant or immaterial.

1. The decedent died testate and domiciled in the Borough of Manhattan, City of New York, New York on February 24, 1969.

2. The decedent's last will and testament was duly admitted to probate on April 3, 1969 in the Surrogate's Court,

Stipulation of Facts

New York County, New York. A copy of the will is attached as Exhibit 1.

3. Herbert Marx, Jacques Coe, Jr., and Chase Manhattan Bank, N.A. were issued letters testamentary by the Surrogate's Court, New York County, New York. On June 20, 1973, the date of the filing of the petition, their principle office was c/o Chase Manhattan Bank, N.A., 1 Chase Manhattan Plaza, New York, New York 10005.

4. Petitioners filed a Federal estate tax return with the District Director of Internal Revenue in Manhattan, New York on May 22, 1970. A copy of the return is attached as Exhibit A.*

5. The testator left surviving himself, his wife Caroline, his daughter Nancy Caruso, and two grandchildren.

6. On July 2, 1969, Caroline Neugass executed, pursuant to the provisions of Article FIFTH (b) of the testator's last will and testament, a notarized document with an attached schedule. A copy of that document and the attached schedule is attached as Exhibit 2.

7. On July 2, 1969, Caroline Neugass executed, pursuant to the provisions of Article FIFTH (a) of the testator's last will and testament, a notarized document. A copy of the document is attached as Exhibit 3.

*Note: Exhibit "A" omitted from this Appendix.

Stipulation of Facts

8. On July 2, 1969, Nancy Caruso executed, pursuant to the provisions of Article FIFTH(b) of the testator's last will and testament, a notarized document with an attached schedule. A copy of that document and the attached schedule is attached as Exhibit 4.

9. Petitioners concede that the value of the property listed in Item 6 on Schedule B of the return should be increased by \$15.84 as set forth in the statutory notice.

10. The parties agree that the \$250,000.00 U.S. Treasury Bonds, 3%, due 2/15/95, listed in Item 16(a) and (b) on Schedule B of the return, are to be valued at par to the extent of the Federal estate tax liability as finally determined.

11. Respondent concedes that the value of the property listed in Item 1 on Schedule F of the return is correct as reported on the return.

12. The parties agree that Item 9 on Schedule F of the return was properly eliminated as set forth in the statutory notice.

13. The parties agree that the proper amount to be reported under Item 3-i on Schedule J of the return will be computed at the time of the Rule 155 computation based upon documentation to be submitted by petitioners at that time.

Stipulation of Facts

14. The parties agree that the debts of the decedent listed on Schedule K of the return were properly increased by \$23,134.31 as set forth in the statutory notice.

15. Respondent concedes that petitioners are entitled to a credit for estate taxes paid to the State of New York to the fullest extent allowable under the provisions of Int. Rev. Code of 1954, §2011.

ALAN S. ROSENBERG
Counsel for Petitioners
300 Park Avenue
New York, New York 10022

MEADE WHITAKER
Chief Counsel
Internal Revenue Service

By:

THEODORE E. DAVIS
Assistant Regional Counsel
26 Federal Plaza, 12th Fl.
New York, New York 10007
Tel. No.: 212 264-0270

EXHIBIT 1 ANNEXED TO STIPULATION OF FACTS
(WILL)

I, LUDWIG NEUGASS, of the City, County and State of New York, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all prior Wills, Testaments and Codicils at any time made by me.

FIRST: (a) I direct that all my just debts and funeral and administration expenses be paid as soon after my death as may be practicable.

(b) I desire that my remains be cremated.

SECOND: I give and bequeath all of my household and personal effects, including jewelry and automobiles, if any, but not including paintings, procelain or other works of art, to my wife, CAROLYN NEUGASS, if she survives me or, if she predeceases me, to my daughter, NANCY CAROUSO, if she survives me.

THIRD: I give and bequeath:

- | | |
|--|---------------------------|
| (a) To FEDERATION OF JEWISH
PHILANTHROPIES OF NEW YORK,
the sum of | SEVEN THOUSAND
DOLLARS |
| (b) To UNITED JEWISH APPEAL OF
GREATER NEW YORK, INC.,
the sum of | FOUR THOUSAND
DOLLARS |
| (c) To NEW YORK CITY CANCER
COMMITTEE OF THE AMERICAN
SOCIETY FOR THE CONTROL OF
CANCER, INC., the sum of | FIVE THOUSAND
DOLLARS |
| (d) To NEW YORK HEART
ASSOCIATION, INC.,
the sum of | FIVE THOUSAND
DOLLARS |
| (e) To NEW YORK TUBERCULOSIS
HEALTH ASSOCIATION, INC.,
the sum of | TWO THOUSAND
DOLLARS |

Exhibit 1 Annexed to Stipulation of Facts

- | | | |
|-----|--|---------------------------|
| (f) | To KESSLER INSTITUTE FOR
REHABILITATION, the sum of | ONE THOUSAND
DOLLARS |
| (g) | To DEBORAH HOSPITAL of
Brown Mills, New Jersey,
the sum of | THREE THOUSAND
DOLLARS |

FOURTH: (a) I give and bequeath the sum of TEN THOUSAND DOLLARS to my brother, FRITZ NEUGASS, if he survives me or, if he predeceases me, to his widow, if she survives me, provided she was married to and living with him at the date of his death.

(b) I give and bequeath the sum of THREE THOUSAND DOLLARS to my friend SIEGFRIED LIEPTER if he survives me.

(c) I give and bequeath the sum of TEN THOUSAND DOLLARS to LORE HITCHCOCK, if she survives me or, if she predeceases me, to her husband, HOBART HITCHCOCK, if he survives me or, if he also predeceases me, to their descendants me surviving, per stirpes.

FIFTH: I direct that if my wife, CAROLYN NEUGASS, survives me, she shall have the life use of all my paintings and other works of art (hereinafter called my "collection"), without bond, and that upon her death my daughter, NANCY CAROUSO, if she is then living, shall have the life use of said collection, without bond. Upon the death of the survivor of my wife and my daughter, said collection shall become the absolute property of the LUDWIG NEUGASS FOUNDATION.

Neither my wife nor my daughter shall be under any duty to insure said collection or any item therein,

Exhibit 1 Annexed to Stipulation of Facts

but if the FOUNDATION shall elect so to insure the proceeds received upon any loss shall become the absolute property of the FOUNDATION, (free of the life use of either my wife or my daughter).

With respect to any item in said collection:

(a) Within six months after the date of my death, either my wife or my daughter may renounce her life use thereof and, if both of them so renounce, the item shall become the absolute property of the FOUNDATION.

(b) Within six months after the date of my death, either my wife or my daughter may elect to take absolute ownership of any item, whereupon said item shall become the absolute property of my wife or my daughter; in the case of my daughter, such election shall take effect if and only when her life use has begun.

(c) At any time after said six months period either my wife or my daughter may terminate her life use of any item and thus accelerate with respect to said item the provisions otherwise effective upon her death.

SIXTH: All the rest, residue and remainder of my estate, real, personal or otherwise and wheresoever situate, including any lapsed legacies or bequests, hereinafter called my residuary estate, shall be disposed of as follows:

(a) If my wife and any descendant of mine survives me, one-half of my residuary estate shall be set aside for my wife and disposed of as provided in subdivision (d) of this Article and one-fourth of my residuary estate (or one-half thereof if my daughter, NANCY, survives me and has no then living descendants) shall be set aside for NANCY and

Exhibit 1 Annexed to Stipulation of Facts

disposed of as provided in subdivision (f) of this Article and one-fourth thereof (or one-half thereof if NANCY does not survive me but any descendant of hers does survive me) shall be divided into separate shares per stirpes for NANCY's descendants me surviving and each such share shall be disposed of as provided in subdivision (g) of this Article.

(b) If my wife predeceases me, three-fourths of my residuary estate (or all thereof if my daughter survives me and has no then living descendants) shall be set aside for NANCY and disposed of as provided in subdivision (f) of this Article and one-fourth thereof (or all thereof if NANCY predeceases me and any descendant of hers survives me) shall be divided into separate shares per stirpes for NANCY's descendants me surviving and each such share shall be disposed of as provided in subdivision (g) of this Article.

(c) If my wife survives me and if no descendant of mine survives me, my residuary estate shall be set aside in two equal parts for my wife, one to be disposed of as provided in subdivision (d) of this Article and the other as provided in subdivision (e) of this Article.

(d) Any share above set aside for my wife and directed to be disposed of as provided in this subdivision (d) shall be held by my Executors and Trustees in separate trust to pay the income therefrom in quarterly or more frequent installments to my wife during her lifetime. Upon her death, the then principal of said trust shall pass in such manner (including to her estate, if she so appoints) as my wife shall by Will appoint but, to the extent that

Exhibit 1 Annexed to Stipulation of Facts

said power shall not be effectively exercised, said principal shall be added to the principal of the trust for my daughter, NANCY, under subdivision (f) of this Article and disposed of as a part thereof or, if NANCY is then dead, shall be divided into separate portions per stirpes for her then living descendants and each such portion shall be held in trust as provided in subdivision (g) of this Article or added to any then existing trust under subdivision (g) and disposed of as a part thereof (subject to subsequent but not prior mandatory distributions of principal).

(e) Any share above set aside for my wife and directed to be disposed of in this subdivision (e) shall be held by my Executors and Trustees in separate trust to pay the income therefrom in quarterly or more frequent installments to my wife during her lifetime. Upon her death the then principal of said trust shall be distributed absolutely to the LUDWIG HEUGASS FOUNDATION.

(f) Any share above set aside for my daughter and directed to be disposed of as provided in this subdivision (f) shall be held by my Executors and Trustees in separate trust to pay the income therefrom in quarterly or more frequent installments to my daughter during her lifetime. Upon her death the then principal of said trust shall pass to such one or more of her descendants in such shares, equal or unequal, and subject to such lawful trusts, terms and conditions as she shall by Will specifically referring to this Will appoint but to the extent that said power shall not be effectively exercised, said principal shall be divided

Exhibit 1 Annexed to Stipulation of Facts

into separate portions per stirpes for her then living descendants and each such portion shall be distributed absolutely except that any portion so set aside for a person who is then the beneficiary of a trust or trusts hereunder shall be added to the principal of said trust(s) and disposed of as a part thereof (subject to subsequent but not prior mandatory distributions of principal.)

(g) Upon my death or the death of my wife, any share or portion above directed to be disposed of as provided in this subdivision (g) shall be held by my Executors and Trustees in separate trust to apply so much of the income therefrom for the support, education and maintenance of the beneficiary as my Executors and Trustees, in their absolute discretion, deem necessary or advisable, accumulating any balance of said income and adding the same to principal until the beneficiary attains the age of twenty-one. Thereafter, the income shall be paid to the beneficiary during his or her lifetime provided that upon the beneficiary attaining the age of twenty-five, one-fourth of the then principal of his or her trust shall be distributed to him or her absolutely; upon the beneficiary attaining the age of thirty, a further one-third of the then principal of his or her trust shall be distributed to him or her absolutely and upon the beneficiary attaining the age of thirty-five, the balance of the principal of his or her trust shall be distributed to him or her absolutely.

In the event of and upon the death of the beneficiary during the continuance of his or her trust, the

Exhibit 1 Annexed to Stipulation of Facts

then principal thereof shall be divided into separate parts per stirpes for his or her then living descendants or in default thereof for my then living descendants and each such part shall be distributed absolutely except that any part so set aside for a person who is then the beneficiary of a trust hereunder shall be added to the principal of said trust and disposed of as a part thereof (subject to subsequent but not prior mandatory distributions of principal).

(h) I authorize and empower my Executors and Trustees to pay to or apply for the beneficiary of any trust under subdivision (d), (f) and (g) of this Article so much of the principal of his or her trust as my Executors and Trustees, in their absolute discretion, deem in his or her best interests without regard to his or her other resources. With respect to the trust for my wife under subdivision (e) of this Article, in the remote contingency that the trust for her benefit under subdivision (d) of this Article has been exhausted, I authorize and empower my Executors and Trustees to pay to or apply for the benefit of my wife such sums out of the principal of her trust under subdivision (e) of this Article as they deem that she needs for her support after giving due consideration to her other resources including, without limitation, all of her interests under this Will.

(i) Notwithstanding the foregoing, no trust created by this Will shall continue longer than twenty-one years after the death of the last survivor of my wife

Exhibit 1 Annexed to Stipulation of Facts

and all of my descendants living at the date of my death and at the end of such period if any trust is still in force, it shall thereupon terminate and the principal thereof shall be distributed absolutely to the beneficiary of said trust.

SEVENTH: In the remote contingency that upon my death or upon the termination of any trust hereunder any part of my residuary estate or the principal of said trust is not effectively disposed of pursuant to the foregoing provisions of this Will, I give, devise and bequeath said property absolutely to the LUDWIG NEUGASS FOUNDATION.

EIGHTH: I nominate and appoint my friends JACQUES COE, JR. and HERBERT MARKS and THE CHASE MANHATTAN BANK as Executors hereof and Trustees hereunder. If either of JACQUES or HERBERT fails to qualify or ceases to be qualified, I nominate and appoint my friend, ABRAHAM J. BRILOFF, to fill the vacancy.

Subject to the foregoing, I authorize and empower a sole surviving individual Executor or Trustee to designate an individual to act with or succeed him.

I direct that no bond or other security be required for any reason whatsoever of any Executor or Trustee named herein or designated as herein provided.

NINTH: I hereby grant to my Executors and Trustees, in addition to the general powers conferred upon them by law, the following discretionary powers

Exhibit 1 Annexed to Stipulation of Facts

with respect to the property, real, personal or otherwise, at any time constituting part of my estate or of the trusts herein except that subdivisions (a), (b) and (m) shall not apply to the trust for my wife under subdivision (d) of Article SIXTH of this Will:

(a) To distribute my estate and set up the trusts herein at one time or at different times as soon after my death as they may deem practicable, whether before or after the expiration of any statutory period.

(b) To charge or credit to principal or income or to apportion between them, in such manner as they deem advisable, any ordinary or extraordinary expenses and any extraordinary, wasting or liquidating dividends and any dividends payable in the stock of the corporation declaring the dividend or payable in the stock of another corporation and so-called "capital gains dividends" declared by investment companies or investment trusts; to determine if and to what extent they shall amortize any premium paid by them on bonds or other obligations for the payment of money; upon the death of the income beneficiaries or any other termination of the trusts herein, any accrued income (including dividends theretofore declared but not yet payable) shall be paid to the persons entitled to receive the income when it becomes payable, but any undistributed income which the Executors or Trustees may accumulate in their discretion shall be added to principal.

(c) To make any payment or distribution (required or authorized under this Will) either wholly or partly in kind at market value at date of distribution; to cause any share to be composed of cash, property or undivided fractional interests in property different in kind from any other share; the trust for my wife under subdivision (d) of Article SIXTH of this Will shall not be set up out of assets which do not qualify for the Marital Deduction, or which are subject to estate or inheritance taxes imposed by any foreign country or possessions or political subdivisions thereof, or which constitute items of income in respect of a decedent (as said term is defined in Section 691 of the Internal Revenue Code of 1954 or the comparable provision in force at the date of my death), except to the extent that said trusts cannot be satisfied by other assets.

(d) To alter, repair, improve, demolish, manage, partition, mortgage, lease for any period (including a period in excess of any fixed by statute), exchange, grant options to lease or to buy, and sell or dispose of, at public or private sale and upon such conditions and such terms as to cash and credit as they deem advisable, any of said property; said

Exhibit 1 Annexed to Stipulation of Facts

leases may extend beyond the duration of the trusts herein and all the powers granted in this subdivision (and granted elsewhere in this Will) may be exercised after the termination of the trusts in connection with the proper administration and distribution thereof.

(e) To borrow such sums as they deem advisable for the proper administration of my estate and to give security therefor.

(f) To continue, settle or discontinue any business or partnership in which I may be interested.

(g) To continue to hold any property, real, personal or otherwise, including but not limited to stocks, bonds or other securities, domestic or foreign, in the form in which it shall be at the time of my death or as the form thereof may be changed pursuant to the provisions of the other subdivisions in this Article of my Will, so long as they, in their absolute discretion, deem it advisable, without regard to the limitations imposed by law on the investment of estate or trust funds.

(h) To invest and reinvest the principal and accumulated income in any property, real, personal or otherwise, including but not limited to stocks, bonds or other securities, domestic or foreign, and shares or interests in investment companies, investment trusts or Common Trust Funds of a bank or trust company, that they may, in their absolute discretion, deem advisable, without regard to the limitations imposed by law on the investment of estate or trust funds.

(i) To employ any person, firm, corporation, bank or trust company for advice with respect to investment policy, but my Executors or Trustees may, in their absolute discretion, follow or refrain from following any recommendations so obtained, and said recommendations shall not in any way limit the discretionary power and authority herein conferred upon them with respect to investments; to employ accountants and bookkeepers; and to charge the fees and expenses of the foregoing to my estate or the trusts herein.

(j) To retain possession, in their absolute discretion, of any property payable absolutely to an infant, and to invest and reinvest the same, to collect the income therefrom, and, after deducting all proper expenses, to apply the income and principal to the use of said infant, with all the powers, rights and compensation of Trustees hereunder, provided, however, that nothing herein contained shall be construed to prevent or postpone the vesting of said property in said infant or to suspend the alienability of said property.

(k) In determining the amount of income or

Exhibit 1 Annexed to Stipulation of Facts

principal applicable to the use of an infant, to disregard the ability of the parent or parents of said infant to support said infant; and to make payment of any income or principal, applicable to the use of or payable to an infant, to the guardian (whether qualified in my domicile or any other jurisdiction) of the person or property, or to the parent or parents of such infant, or to the person with whom such infant resides, or to apply the same for his or her benefit; the receipt of such guardian, parent or person, or the evidence of the application of such income or principal shall be a full discharge to said Executors and Trustees for such payment; the parent or the person with whom the infant resides need not be legally appointed his or her guardian; nor shall said guardian, parent or person be obliged to give any accounting for the disposition of said income or principal except upon the written request of the Executors or Trustees hereunder.

(l) To remove any of said property to or from my domicile or any other jurisdiction.

(m) To organize or participate in the organization of corporations, and to transfer to them any part or all of said property in exchange for securities thereof.

(n) To exercise or perform every power, authority or duty, including discretionary powers, by the concurrence and in the names of a majority of the Executors or Trustees qualified to participate, with the same effect as if all had joined therein; but by unanimous vote of the Executors or Trustees they may determine the number (one or more) who may give instructions to custodians, sign checks or have access to safe deposit boxes.

(o) To claim expenses as estate tax or income tax deductions as they deem advisable and to determine if and to what extent any adjustment in favor of principal required by law shall be made.

TENTH: (a) If my wife shall die under such circumstances that it cannot be determined whether I or my wife died first, then, for the purposes of this Will, my wife shall be deemed to have survived me, and my estate shall pass in such manner as would occur hereunder if my wife had survived me. If any other person beneficially interested hereunder shall die in the course of or as a direct result of the same disaster, accident or calamity as shall cause my death or the death of the life beneficiary upon whose death said person's interest is to take effect or under such circumstances that it cannot be readily determined whether I or said person, or the life beneficiary or said person, as the case may be, died first, then, for the purposes of this Will, said person shall be deemed to have died before me or before said life beneficiary, and my estate shall pass in such manner as would occur hereunder if said person

Exhibit 1 Annexed to Stipulation of Facts

had predeceased me or said life beneficiary, as the case may be.

(b) There shall be charged against my residuary estate, without right of reimbursement, all estate and inheritance taxes of whatever kind imposed upon the property disposed of in this Will and upon any other property, including insurance, otherwise disposed of and subject to the imposition of said taxes. However, if my wife survives me, no part of said taxes shall be charged against her trust under subdivision (d) of Article SIXTH of this Will.

(c) Any income or principal payable to a beneficiary hereunder may, in the discretion of my Executors and Trustees, be applied by them for the benefit of said beneficiary.

(d) If my wife survives the probate of my Will, the testamentary power of appointment granted to her in this Will shall be exercisable only by specific reference to this Will.

(e) Any person may renounce, in whole or in part, any provision in his or her favor hereunder and, in such event, the property covered by said provision, to the extent renounced, shall be disposed of as though said person had predeceased me, and if said property is to be held in trust, to the extent renounced, said property shall become free of the trust for said person (and of any power of appointment said person may have with respect thereto) and shall be disposed of as though said person had predeceased me. I do not intend by the foregoing to suggest that any particular person should so renounce.

(f) The LUDWIG NEUGASS FOUNDATION is about to be incorporated under the Membership Corporations Law of New York. If for any reason this is not effectuated during my lifetime, I direct my Executors to cause such a charitable foundation of that name to be incorporated within six months after my death.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 6 day of July ,
One Thousand Nine Hundred Sixty-Seven.

/s/ Ludwig Neugass (L.S.)

The foregoing instrument was at the date thereof subscribed, sealed, published and declared by the above-named Testator, LUDWIG NEUGASS, as and

/s/ Alan S. Rosenberg
/s/ James B. Halpern
/s/ Paul H. Epstein

Exhibit 1 Annexed to Stipulation of Facts

for his Last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have at the same time subscribed our names as witnesses thereto.

/s/ Alan S. Rosenberg residing at 115 Central Park West
N.Y.C.

/s/ James B. Halpern residing at 511 E. 80 St.
N.Y.C.

/s/ Paul H. Epstein residing at 2126 Benson Ave.
B'klyn, N.Y.

Exhibit 1 Annexed to Stipulation of Facts
(CODICIL)

I, LUDWIG NEUGASS, of the City, County and State of New York, do hereby make publish and declare this to be a Codicil to my Last Will and Testament, dated the 6th day of July, One Thousand Nine Hundred Sixty-Seven.

FIRST: My friend SIEGFRIED LIEPTER having died, I hereby revoke the legacy to him contained in Subdivision (b) in ARTICLE FOURTH of my said Will.

SECOND: I give and bequeath the sum of FIFTEEN THOUSAND DOLLARS (free of estate and inheritance taxes) to my friend ABRAHAM J. BRILOFF, if he survives me, in appreciation of his many years of friendship and guidance.

THIRD: Except as above provided, I hereby ratify, confirm and republish the provisions contained in my said Will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 12th day of February, One Thousand Nine Hundred Sixty-Eight.

/s/ Ludwig Neugass (L.S.)

The foregoing instrument was at the date thereof subscribed, sealed, published and declared by the above-named Testator, LUDWIG NEUGASS, as and for a Codicil to his Last Will and Testament, in the presence of us, who, at his request, in his presence and in the presence of each other, have at the same time subscribed our names as witnesses thereto.

/s/ Alan S. Rosenberg residing at 115 Central Park West
N.Y.C.

/s/ Paul H. Epstein residing at 363 First Ave.
N.Y.C.

EXHIBIT 2 ANNEXED TO STIPULATION OF FACTS
SURROGATE'S COURT : NEW YORK COUNTY

-----X
In the Matter of the Administration
of the Estate of

LUDWIG NEUGASS,
Deceased.

ELECTION PURSUANT
TO ARTICLE FIFTH
(b) OF THE WILL OF
LUDWIG NEUGASS

-----X
WHEREAS, under the terms of Article FIFTH of the
Will of LUDWIG NEUGASS, deceased, said decedent bequeathed
to his wife, CAROLYN NEUGASS, the life use of all of his
paintings and other works of art; and

WHEREAS, under the terms of Article FIFTH (b) of
said Will, his wife may within six months after the date
of said decedent's death, elect to take absolute ownership
of any item of his paintings and other works of art, where-
upon said item shall become her absolute property.

NOW, THEREFORE, the undersigned, does hereby elect
to take absolute ownership of the items of paintings and
other works of art of the decedent listed on Schedule A
annexed hereto.

Dated: July 2, 1969.

Carolyn Neugass
CAROLYN NEUGASS

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On this 2nd day of July, 1969, before me person-
ally appeared, CAROLYN NEUGASS, to me known and known to me
to be the person mentioned and described in, and who executed
the foregoing instrument, and she duly acknowledged to me
that she executed the same.

Lawrence J. Rothensberg
Notary Public

NOTARY PUBLIC, State of New York
LAWRENCE J. ROTHENBERG
No. 41-67735
Qualified in Queens County
Commission Expires March 12, 1970

Exhibit 2 Annexed to Stipulation of Facts

SCHEDULE A
TO ELECTION OF CAROLYN NEUGASS
PURSUANT TO ARTICLE FIFTH (b)
OF THE WILL OF LUDWIG NEUGASS

1. All of the Meissen porcelains of Ludwig Neugass.
2. The following paintings of Ludwig Neugass:
 - i. P. Signac
View on the Seine.
Oil on canvas,
13" x 17-3/4".
Sgd. and inscribed, dated 1884 at l.r.
 - ii. P. Bonnard
Le Chemin Creux.
Oil on canvas,
17-3/4" x 21".
Sgd. at l.l.
 - iii. M. de Vlaminck
Road through the fields.
Oil on canvas,
25" x 31-1/2".
Sgd. at l.l.
 - iv. Albert Marquet
Luxembourg Parc
Oil on canvas,
19-1/4" x 24".
Sgd. at l.r.
 - v. Jules Pascin
A woman model stretched on a couch,
wearing a rose colored skirt.
Oil on canvas,
23" x 28-1/4".
Sgd. at l.l.
 - vi. Raphael Soyer
Head of a girl wearing a red scarf.
Oil on board,
9-1/2" x 7-3/4".
Sgd. at l.r.
 - vii. Eduard Munch
Portrait study of a man.
Oil on board,
13-1/4" x 9-1/4".
Sgd. and dated at right, 1883.
 - viii. A. Derain
Head of a woman.
Oil on canvas,
14-1/2" x 11-1/2".
Sgd. at l.r.

Exhibit 2 Annexed to Stipulation of Facts

- ix. Robert Phillip
A nude model, half-length.
Oil on canvas,
14-1/2" x 7-1/2".
Sgd. in u.r.h. corner.
- x. Maurice Utrillo
Moulin de la Galette.
Oil on board,
20" x 24-1/4".
Sgd. at l.r.
- xi. Claude Monet
Study - View at Giverny -
Trees and meadows.
Oil on canvas,
35-3/4" x 31-1/2".
Sgd. and dated '86 at l.l.
- xii. Odilon Redon
Salome - two women and a head.
Pastel,
22" x 15-1/4".
Sgd. at l.l.
- xiii. L. Kirchner
Madchen Kopf.
Water Color,
17-1/2" x 13-1/2".
Sgd. and dated l.r. 1903.
- xiv. Jules Pascin
Portrait of a man, on the reverse,
three young girls.
Cubistic painting.
Oil on canvas,
24-1/2" x 19-1/2".
Unsigned.
- xv. Guy Charon
View of a bay - La Mare
Oil on canvas,
20-1/2" x 25".
- xvi. Marc Chagall
Les Amoureux - bouquet de fleurs.
Water color,
30" x 21-3/4".
Sgd. at l.r.
- xvii. Marc Chagall
Bouquet de fleurs and two figures.
Gouache,
18" x 14-1/2".
Sgd. at l.l.
- xviii. Marc Chagall
Les Amoureux sur le toit.
Water color and gouache,
14-3/4" x 5-1/2".
Sgd. at l.l.
- xix. Raphael Soyfer
Woman half-nude dressing before
a mirror.
Oil on canvas. 23-1/2" x 19-1/2".
Sgd. at l.r.

Exhibit 2 Annexed to Stipulation of Facts

- xx. F. Desnoyer
Port scene - Isle de Reu.
Oil on canvas.
21" x 32".
Sgd. at l.r.

- xxi. Campigli
Portrait of a young woman.
Oil on canvas.
15-1/2" x 12-3/4".
Sgd. at l.l.

- xxii. B. Lorigou
Vase of flowers.
Oil on canvas.
28-1/2" x 17-1/2".
Sgd. at l.l.

- xxiii. Moshe Mokaday
Two boys.
Oil on canvas.
34-1/2" x 25".
Sgd. at l.l.

- xxiv. Jerome
Still life - Gladiolus leaves.
Oil on canvas.
16-1/2" x 31-1/2".

- xxv. Robert Phillip
Portrait of a young girl.
Oil on canvas.
7-1/2" x 5-3/4".

- xxvi. Andre Minaux
Semi-nude woman.
Oil on board.
29" x 28-1/2".
Sgd. in u.r.h.c.

- xxvii. Jules Pascin
Two nudes.
Oil on canvas.
28-1/2" x 23".
Unsigned.

- xxviii. L. Massa
Woman seated in a cafe.
Oil on canvas.
26-1/2" x 18-3/4".
Sgd. at l.l.

- xxix. L. Massa
Woman seated astride a chair.
Oil on canvas.
20" x 13-1/4".
Sgd. at l.r.

Exhibit 2 Annexed to Stipulation of Facts

- xxx. L. Massa
Woman seated.
Oil on canvas,
27" x 18-1/2".
Sgd. at l.l.
- xxxi. B. Lorjou
Blue vase with flowers.
Oil on canvas,
30" x 21-1/2".
Sgd. at l.l.
- xxxii. Raphael Soyer
Girl in green blouse.
Oil on canvas,
13-1/2" x 9-1/2".
Sgd. at the bottom right.
- xxxiii. Milovan Stanic
Steps of a church in Dubrovnic.
Oil on canvas,
38-1/2" x 26-3/4".
Sgd. at l.r.
- xxxiv. Serra M3 - Cinello 57
Egyptian Figure Study
Tempera,
7-3/4" x 10-3/4".
- xxxv. L. P. Moretti
Reclining nude.
Oil on canvas,
17-1/2" x 21".
Sgd. at l.r.
- xxxvi. Jinx Walker
New Prophet Stoned.
Oil on canvas,
27-1/4" x 11-1/2".
Sgd. and dated at l.r. 1965.
- xxxvii. B. Lorjou
Still life - cup and saucer, etc.
Oil on board,
12-3/4" x 17-3/4".
Sgd. at l.l.
- xxxviii. Yvonne Eltras
Interior - still life with a chair
Oil on board,
24" x 35".
- xxxix. Alex Weise
Mountain scene.
Oil on canvas,
25-3/4" x 31-1/2".
Sgd. at l.r.

Exhibit 2 Annexed to Stipulation of Facts

- xl. Alex Weise
Snow scene with mountains.
Oil on canvas,
31-1/2" x 38-1/2".
- xli. M. Borres
Portrait of a girl.
Oil on canvas,
30" x 24-1/2".
- xlii. M. Laminger
A boy in sailor suit, seated on
fur-covered seat, holding a whip.
Oil on canvas,
40" x 29".
- xliii. Emile Bernard
Still life of fruit.
Oil on canvas,
20-1/2" x 24-3/4".
Sgd. and dated at l.l. 1889.
- xliv. Georges Rouault
Baptism of Christ
Oil on paper mounted on canvas,
24-1/2" x 19-1/4".
- xl. Maurice de Vlaminck
Pont sur la Seine.
Oil on canvas,
17-3/4" x 21".
Sgd. at l.r.
- xlvi. Fifteen Miscellaneous Pictures
Various sizes and subjects.
Small to medium size.
20th Century.

3. The following bronzes of Ludwig Neugass:

- i. Giuseppe Macri, Italian Contemporary.
Noah's Ark.
13" high, 10" wide.
- ii. Giuseppe Macri, Italian Contemporary.
Last Supper.
14" high.
- iii. Giuseppe Macri, Italian Contemporary.
The Harp.
13-1/2" high, 14" wide.
- iv. Giuseppe Macri, Italian Contemporary.
Flight into Egypt.
6" high.

Exhibit 2 Annexed to Stipulation of Facts

- v. Giuseppe Macri, Italian Contemporary.
Moses and Tablets.
12-1/2" high.
- vi. Milton Hebard, American Contemporary.
Hanging Acrobats.
17" high.

EXHIBIT 3 ANNEXED TO STIPULATION OF FACTS
SURROGATE'S COURT : NEW YORK COUNTY

-----X
In the Matter of the Administration of
the Estate of ✓

LUDWIG NEUGASS,
Deceased.

RENUNCIATION
PURSUANT TO
ARTICLE FIFTH (a)
OF THE WILL OF
LUDWIG NEUGASS

-----X
WHEREAS, under the terms of Article FIFTH of the
Will of LUDWIG NEUGASS, deceased, said decedent bequeathed
to his wife, CAROLYN NEUGASS, the life use of all of his
paintings and other works of art; and

WHEREAS, under the terms of Article FIFTH (a) of
said Will, his wife may within six months after the date of
said decedent's death, renounce her life use of any item of
his paintings and other works of art.

NOW, THEREFORE, the undersigned, does hereby re-
nounce her life use of the items of paintings and other works
of art of the decedent listed on Schedule A annexed hereto,
thereby commencing the life use of NANCY CAROUSO, to begin
upon the execution of this instrument.

Dated: July 2, 1969.

Carolyn Neugass
CAROLYN NEUGASS

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On this 2nd day of July, 1969, before me person-
ally appeared, CAROLYN NEUGASS, to me known and known to me
to be the individual mentioned and described in, and who
executed the foregoing instrument and she duly acknowledged
to me that she executed the same.

Lawrence J. Rothenberg
Notary Public

NOTARY PUBLIC, State of New York
LAWRENCE J. ROTHENBERG
No. 41-8677735
Qualified in Queens County
Commission Expires March 30, 1973

Exhibit 3 Annexed to Stipulation of Facts

SCHEDULE A
TO RENUNCIATION OF CAROLYN NEUGASS
PURSUANT TO ARTICLE FIFTH (a)
OF THE WILL OF LUDWIG NEUGASS

1. The following paintings of Ludwig Neugass:

- a. E. Vuillard
Nude seated in an interior.
Oil on canvas,
29" x 20-3/4".
- b. Paul Gauguin
Portraits of three young girls,
the artist's daughters.
Oil on canvas,
12-1/4" x 18-1/4".
Sgd. and dated l.l. '85.
- c. M. de Vlaminck
Still life of various objects,
metal, etc.
Oil on canvas,
24" x 28-1/2".
Sgd. at l.r.
- d. M. Utrillo
Street in Sannois - closed shops.
Oil on board,
20-1/4" x 28-1/2".
Inscribed and sgd.
Maurice Utrillo Valladon
(Sannois) Decembre 1915
(S. et O.)
- e. M. Chagall
Hommage au Passe
Oil on board,
27-3/4" x 29".
Sgd. and dated at l.r. 1944.
- f. M. de Vlaminck
Still life, flowers and fruit.
Oil on canvas,
18-1/4" x 23-1/4".
Sgd. at l.r.
- g. Georges Braque
Still life with purple flowers.
Oil and gouache,
19" x 23-1/4".
Sgd. at l.l.

Exhibit 3 Annexed to Stipulation of Facts

h. R. Dufy

View at Deauville, figures on a pier.
Oil on canvas,
17-3/4" x 21".
Sgd. on the bottom and dated 1929.

i. Marc Chagall

Coucher de soleil - with Holy Family.
Gouache, 27-1/2" x 21-3/4".
Sgd. and dated at l.r. 1952.

EXHIBIT 4 ANNEXED TO STIPULATION OF FACTS

SURROGATE'S COURT : NEW YORK COUNTY

-----x

In the Matter of the Administration
of the Estate of

LUDWIG NEUGASS,

Deceased.

ELECTION PURSUANT
TO ARTICLE FIFTH (b)
OF THE WILL OF
LUDWIG NEUGASS

-----x

WHEREAS, under the terms of Article FIFTH of the Will of LUDWIG NEUGASS, deceased, said decedent bequeathed to his daughter, upon the death of his wife, CAROLYN NEUGASS, if his daughter was then living, the life use of all his paintings and other works of art; and

WHEREAS, under the terms of Article FIFTH (a) of said Will his wife may, within six months after the date of decedent's death renounce her life use of any item of his paintings and other works of art, thereby commencing the life use of his daughter; and

WHEREAS, under the terms of Article FIFTH (c) of said Will, his daughter may elect within six months after said decedent's date of death, to take absolute ownership of any item, said election to take effect if and only when her life use has begun.

NOW, THEREFORE, the undersigned does hereby elect to take absolute ownership of the items of paintings and other works of art of the decedent listed on Schedule A annexed hereto, said election to take effect when her life use begins.

Dated: July 2, 1969.

Nancy Carouso
NANCY CAROUSO

STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

On this 2nd day of July, 1969, before me personally appeared, NANCY CAROUSO, to me known and known to me to be the individual described and mentioned in, and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

NOTARY PUBLIC State of New York
LAWRENCE J. BOTTENBERG
No. 41147734
Qualified in Queens County
Commission Expires March 30, 1978

Lawrence J. Bottenberg
Notary Public

Exhibit 4 Annexed to Stipulation of Facts

SCHEDULE A
TO ELECTION OF NANCY CAROUSO
PURSUANT TO ARTICLE FIFTH (b)
OF THE WILL OF LUDWIG NEUGASS

1. The following paintings of Ludwig Neugass:
 - a. E. Vuillard
Nude seated in an interior.
Oil on canvas,
29" x 20-3/4".
 - b. Paul Gauguin
Portraits of three young girls,
the artist's daughters.
Oil on canvas,
12-1/4" x 18-1/4".
Sgd. and dated l.l. '85.
 - c. M. de Vlaminck
Still life of various objects,
metal, etc.
Oil on canvas,
24" x 28-1/2"
Sgd. at l.r.
 - d. M. Utrillo
Street in Sannois - closed shops.
Oil on board
20-1/4" x 28-1/2".
Inscribed and sgd.
Maurice Utrillo Valladon
(Sannois) Decembre 1915
(S. et O.)
 - e. M. Chagall
Hommage au Passe
Oil on board,
27-3/4" x 29".
Sgd. and dated at l.r. 1944.
 - f. M. de Vlaminck
Still life, flowers and fruit.
Oil on canvas,
18-1/4" x 23-1/4".
Sgd. at l.r.
 - g. Georges Braque
Still life with purple flowers.
Oil and gouache,
19" x 23-1/4".
Sgd. at l.l.

Exhibit 4 Annexed to Stipulation of Facts

h. R. Dufy

View at Deauville, figures on a pier.
Oil on canvas,
17-3/4" x 21".
Sgd. on the bottom and dated 1929.

i. Marc Chagall

Coucher de soleil - with Holy Family.
Gouache, 27-1/2" x 21-3/4".
Sgd. and dated at l.r. 1952.

Transcript of Proceedings
UNITED STATES TAX COURT

ESTATE OF LUDWIG NEUGASS, ET AL
Petitioner

vs

COMMISSIONER OF INTERNAL REVENUE

Respondent

DOCKET NO. **4734-73**

LOCATION OF HEARING: **New York, New York**

DATE: **January 23, 1975**

BEFORE: **Honorable C. Moxley Featherston**

APPEARANCES:

Jacob Imberman
Attorney for Petitioner

Lawrence J. Rothenberg
Attorney for Petitioner

Michael K. Phalin
Attorney for Respondent

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*Opening Statement on Behalf of Petitioners*P R O C E E D I N G S

THE CLERK: All rise please. You may be seated.

The Court is now in session. Docket number 4734-73.

Estate of Ludwig Neugass, deceased, et al. Gentleman,
state your appearances for the record, please.

MR. IMBERMAN: Jacob Imberman and Lawrence J.
Rothenberg for Petitioners.

MR. PHALIN: Michael Kevin Phalin for Respondent.

THE COURT: May we have the opening statements
of the parties?

MR. IMBERMAN: If Your Honor please, the only
issue left in this case is whether or not the estate is
entitled to the benefit of the marital deduction with
respect to that portion of the decedent's art collection
which passed to his wife. It is our contention that the
language of Article 5th of the Will when properly construed
particularly in light of the testimony of the witnesses,
satisfies the requirements of Section 2056 of the Internal
Revenue Code. Because of the uncertainty of New York
law in connection with renunciations, the Will, in form,
gave the widow a life estate in the art work with a right
within six months after the decedent's death to take
absolute ownership. We believe that there is no doubt
that when the widow disclaimed that life interest, and
asserted her right to take the art work outright, that

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Opening Statement on Behalf of Petitioners

1 under subdivision D of Section 2056 that action related
2 back through the date of death and it is as if she had
3 received an outright request of the art collection and
4 the property which she received, therefore, qualified for
5 a marital deduction. Now there is no issue of fact as to
6 the subdivision D aspect of the case -- the stipulation
7 adequate covers exactly what happened. And the law will
8 be brief by us after the trial, if Your Honor please. I
9 merely wish to point out now that this case ought not be
10 decided on the technical arguments which the Government
11 has advanced here.

12 THE COURT: Are there any other provisions in
13 Section 2056 which will aid the petitioner other than 2056-D?

14 MR. IMBERMAN: Well, we believe that the entire con-
15 struction of the Will will indicate that it was the decedent's
16 intent not to give his wife a terminable interest and that,
17 in fact, what she received was a bequest which qualified
18 under Section 2056. The fact of the matter is -- the widow
19 did receive the art collection which was the decedent's
20 intent. The collection will be taxed in her estate so
21 that the spirit of the law as far as marital deduction
22 is concerned is certainly met and the only thing that the
23 Government is attempting to accomplish here is in effect
24 a double taxation of this art collection which we believe
25 is a most inequitable result. Now with regard to the

Opening Statement on Behalf of Petitioners

1 construction of Article 5th and our assertion that it
2 does overall comply with the law, we will offer the
3 testimony of the decedent's attorneys which in connection
4 with the proper construction of the Will -- will show that
5 it was the decedent's intent to give his wife an absolute
6 interest in the art collection. That it was only because
7 of the very uncertain status of the law in New York with
8 respect to renunciations that the Will was drafted techni-
9 cally as it was. But what the decedent intended was to
10 give his wife the entire bundle of rights, so to speak.
11 She could have an outright ownership or she could have
12 a life estate if she wished or she could pass it out to
13 charity.

14 THE COURT: What were the uncertainties in
15 New York law that you referred to?

16 MR. IMBERMAN: The uncertainties in New York
17 law dealt with the manner in which one could renounce
18 and the time went -- the renunciation in a testamentary
19 situation as distinguished from a intestacy had to
20 take place. There was uncertainty, for example, as to
21 whether if a widow was given an outright interest in the
22 property, she could renounce to a life estate. And I
23 would prefer to have the witness who is an expert in
24 this area tell Your Honor precisely what the uncertain
25 status of the law was. And I think Your Honor should

Opening Statement on Behalf of Petitioners

1 know that we rely very heavily on the "Tilyou" case which
2 was decided by the Court of Appeals in this circuit less
3 than -- just about two years ago. And the citation is
4 470 F 2nd 693. Now that was also a case involving a marital
5 deduction and whether or not the decedent's will gave his
6 spouse a terminable interest in the property which passed
7 to her. And "Tilyou", Your Honor, may recall the decedent
8 left his spouse his entire estate and then he added a
9 clause which created a problem. He said that "if she dies
10 before she shall become entitled to any part or share of my
11 residuary estate, then it will pass to his children".
12 The Government claimed that that was a terminable interest
13 and, therefore, the estate was not entitled to a marital
14 deduction. Now the Court of Appeals found in that case
15 that the New York law applied and so it does here. And
16 the law -- the Court also found that the law was uncertain
17 as to the meaning of the words "entitled to" and so here
18 the witness that I will put on the stand will demonstrate
19 for Your Honor very clearly that there was also an uncer-
20 tainty in New York law with respect to renunciations. As
21 a matter-of-fact it was clarified to some extent about
22 four years after the Will was draft in 1971 -- a statute
23 for the first time was passed which dealt with this
24 subject.

25 THE COURT: What does that statute provide?

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Opening Statement on Behalf of Petitioners

1 MR. IMBERMAN It provides that there may be
2 a renunciation within a particular time and in a particular
3 manner. And to clarify the situation and if Your Honor
4 please, I would prefer to have Mr. Lustgarten explain
5 that precisely to Your Honor. But before that time there
6 was no statute. There was a statute which dealt with
7 renunciation in cases of intestacy. Now also in "Tilyou"
8 the Court took extrinsic evidence from the lawyer who
9 drafted the Will in order to demonstrate to the Court
10 the testator's intent and we ask Your Honor, of course,
11 to do the same thing. Permit the lawyer to testify.
12 And, finally, in "Tilyou" the Court of Appeals held
13 that the uncontrovertible evidence in the case showed
14 that the decedent did not intend to give his wife a
15 terminable interest which is exactly what the evidence
16 will show in this case. And I believe that when Your
17 Honor comes to write the opinion of this case, it would
18 not be inappropriate for Your Honor to be guided by the
19 opinion of the Court of Appeals in this latest statement
20 as to the meaning of terminable interest and the manner
21 in which a Will should be interpreted.

22 THE COURT: Are there any ambiguities in the
23 Will of the decedent?

24 MR. IMBERMAN: Well, it's very difficult, Your
25 Honor, and I think some of the cases that we handed up

Opening Statement on Behalf of Petitioners

1 to you to tell when a will is ambiguous. And there may
2 be an ambiguity in the Will even though at first reading
3 it looks as if it's clear because it's always sometimes
4 when you go behind the Will and you look at extrinsic
5 facts that you can see that the Will is ambiguous and here
6 what we are concerned about is to have Your Honor have
7 all of the information, the extrinsic facts
8 concerning the circumstances surrounding the preparation
9 and the execution of this Will. And the New York cases
10 which we have cited to Your Honor, I think very clearly
11 indicate that New York courts will take facts -- testimony
12 with regard to facts and circumstances. I'm not talking
13 about a declaration of the decedent but testimony from others
14 whether they are lawyers or trust officers and I might
15 call this sentence to Your Honor's attention in the "Tilyou"
16 case because that was the very thing that the Court had to
17 determine. And at page 69 the Court of Appeals commented
18 on and I would like to quote. "The receptiveness of New
19 York Courts to extrinsic evidence to determine the circum-
20 stances known to the testator when he drew his Will."
21 And the latest expressions of opinion was by the surrogates
22 in New York who deal primarily with Wills every day clearly
23 indicates that extrinsic evidence is permissible in the
24 very beginning in order to demonstrate to the trial of the fact
25 that there is, indeed, some type of ambiguity which

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1 should be called to his attention even though it isn't
2 patent on the face of the document.

3 THE COURT: Very well. Mr. Phalin.

*** 4 MR. PHALIN: Your Honor, if I first before
5 beginning my opening statement, I formally submit the
6 Stipulation of Facts with Exhibits A and Exhibits 1, 2,
7 3 and 4 attached.

8 THE COURT: Very well. The stipulation has
9 been delivered to the Court and the stipulation together
*** 10 with the enumerated exhibits are in evidence.

11 MR. PHALIN: Secondly, Your Honor, the respondent
12 would request that the Court excuse from the courtroom
13 any potential possible witnesses in this case since the
14 respondent anticipates his remarks in his opening statement,
15 may go to what their anticipated testimony may be if they
16 testify.

17 THE COURT: Very well. The respondent is
18 invoking the rule. If you have witnesses in the courtroom--

19 MR. IMBERMAN: Do you want the witnesses excluded
20 during his opening statement?

21 THE COURT: I beg your pardon?

22 MR. IMBERMAN: I gather that counsel would like
23 to have the witnesses excluded during the course of his
24 opening statement.

25 THE COURT: Yes, that is correct. They may be

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Opening Statement on Behalf of Respondent

1 excused.

2 MR. IMBERMAN: If that's Your Honor's wish, I
3 have never heard of it during an opening statement. I
4 have seen it during testimony, but that's all right. Perhaps
5 the record should note, Your Honor, that Mr. Rosenberg
6 and Mr. Lustgarten have left the room.

7 THE COURT: Very well.

8 MR. PHALIN: Thank you, Your Honor. Your Honor,
9 all the issues in this case with the exception of one
10 have been resolved by the parties. They have either been
11 completely and finally resolved or if not finally resolved
12 as yet, will be finally resolved dependent on the resolution
13 of this one final issue as set forth in the Stipulation of
14 Facts. So the one remaining issue before the Court's
15 decision is as to whether or not a certain property interest
16 passing to the surviving spouse of the testator qualify
17 for the marital deduction. More specifically, in our case
18 the testator had a rather valuable art collection, con-
19 sisting of 55 paintings, 6 bronzes and a number of porcelain.
20 The testator's will provided that upon his death his sur-
21 viving spouse, and this Your Honor is that Article 5th of the
22 Will which is Exhibit 1 in the Stipulation of Facts.
23 The Will provided that upon the testator's death, his
24 wife should have the life use to the entire art collec-
25 tion. Article 5th further providing that the wife --

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Opening Statement on Behalf of Respondent

1 surviving spouse should have a power of appointment to
2 appoint to herself the absolute ownership of any or the
3 entire portion of the art collection within a period of
4 6 months.

5 THE COURT: That provision is not cast in terms
6 of a power of appointment as I understand it. Now you
7 are referring to the language which says that "within
8 six months after the date of my death -- either my wife
9 or my daughter may renounce her life use, thereof, and
10 if both of them so renounce the items shall become the
11 absolute property of the foundation and --"

12 MR. PHALIN: No, Your Honor, I am referring to
13 the following paragraph -- sub-paragraph.

14 THE COURT: All right, now "within six months
15 after the date of my death, either my wife or my daughter
16 may elect to take absolute ownership of any item whereupon
17 said items shall become the absolute property of my wife
18 or my daughter. In the case of my daughter, such election
19 shall take effect if and only when her life use has begun."

20 MR. PHALIN: That is the provision to which I
21 refer, Your Honor.

22 THE COURT: Yes.

23 MR. PHALIN: The Will further provided that
24 should the wife not elect to take any item of the art
25 collection as her outright property and furthermore should

Opening Statement on Behalf of Respondent

1 she no longer desire to have the life use of any item --
2 she had the authority to renounce the life use and that
3 life use would then pass to her daughter and if the daughter
4 renounced the life use as well, it will then pass to the
5 foundation.

6 THE COURT: Well, now, I did not so read the Will.
7 As I understood it-- "within six months after the date of
8 the death of -- my death -- either my wife or my daughter
9 may renounce her life use, thereof, and if both of them
10 so renounce, the items shall become the property of the
11 foundation."

12 MR. PHALIN: That is correct, Your Honor. And
13 the final sub-paragraph -- sub-paragraph C states that
14 "anytime after said six month period, either my wife or
15 my daughter may terminate her life use of any item and
16 thus accelerate with respect to said item the provision
17 otherwise effected upon her death."

18 THE COURT: How would you interpret paragraph B
19 if both the wife and the daughter selected the same item?

20 MR. PHALIN: Well, paragraph B -- the final
21 clause, Your Honor, states that "in the case of my daughter
22 such election shall take effect if and only when her life
23 use has begun." And her life use would not begin as to any
24 specific item in the collection until the wife's life
25 use had expired.

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Opening Statement on Behalf of Respondent

1 THE COURT: From what do you draw that language?

2 MR. PHALIN: From the introductory clause of
3 the Article 5th which directs a life use to the wife and
4 upon her death to the daughter -- the life use. So that
5 with respect to the life use, it went directly to the wife
6 and upon her death or her termination of it, it would go
7 to the daughter.

8 THE COURT: Very well.

9 MR. PHALIN: So these were the provisions of
10 the testator's will. And as it happened, within a six
11 month period after his death, his surviving spouse exercised
12 her power of appointment to herself as expressed in Exhibit
13 2 of the Stipulation of Facts and took outright possession
14 of 49, excuse me, 46 of the 55 paintings -- all 6 of the
15 bronzes and all of the porcelain. And then with respect
16 to the remaining 9 paintings in the art collection, she
17 revoked her life interest and that exercise is found in
18 Exhibit 3 of the Stipulation of Facts. And eventually,
19 as set forth in Exhibit 4 -- the daughter exercised her
20 power of appointment as to the remaining 9 paintings in
21 the collection. So that as a matter-of-fact, the surviving
22 spouse and daughter took the entire collection as their out-
23 right property through their exercises of the respective powers
24 of appointment. The question now before the Court is--whe-
25 ther or not the 46 paintings, 6 bronzes and porcelain taken

Opening Statement on Behalf of Respondent

1 by the wife through her exercise of her power of appointment
2 qualified for the marital deduction. The petitioner's
3 take the position that, if in fact, it does qualify under
4 these specific provisions of Code Section 2056D. The
5 respondent's position is that it does not so qualify. As
6 stated in our legal memorandum we are at present a bit at a
7 loss to understand petitioner's position here since 2056D
8 treats with disclaimers -- situations where either a survi-
9 ving spouse receives a property interest as a result of a
10 third party's disclaimer of that interest or situations where
11 a third party receives a property interest as a result of
12 a surviving spouse's disclaimer of that interest. Now in
13 a factual situation of this case, we don't -- aren't
14 treating with any property interest which passes to anyone
15 as the result of a disclaimer. The surviving spouse here
16 got the property -- not as a result of anyone else's
17 disclaimer -- even a disclaimer on her own part. She
18 received the property as a result for exercise of a power
19 of appointment. She had been given a life estate with a
20 power. She exercised that power. It appears to the
21 respondent that as a result, 2056D is totally inapplicable.
22 But certainly we were fully prepared to expand upon this
23 and treat it more fully on brief. Hopefully, at that time,
24 we may be further enlightened as a result of the petitioner's
25 brief as to exactly what their position is and what authority

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Opening Statement on Behalf of Respondent

1 they have for it. But the respondent is of the opinion
2 this is the only issue before the case and this is how the
3 case should be submitted and if the respective parties
4 should file their briefs on that specific legal question,
5 i.e., does the proper (sic) received by the surviving spouse
6 qualify for the marital deduction under the provisions of
7 2056D. However --

8 THE COURT: Well, now I understood the statement
9 a few minutes ago to be to the effect that not only was
10 the petitioner relying on 2056D but also the broader
11 provisions of 2056A.

12 MR. PHALIN: If that be the case, Your Honor,
13 we would be glad to discuss that on brief as well.

14 THE COURT: Very well.

15 MR. PHALIN: At the appropriate time. However,
16 the petitioners have asked leave of the Court to present
17 oral testimony concerning circumstances surrounding the
18 drafting of the Will in question and concerning the
19 expressed intentions of the testator at the time of the
20 drafting of the Will in question. If I may attempt to
21 summarize quickly what that anticipated testimony would
22 amount to -- apparently it is this. That at the time the
23 testator came to his attorneys to have them draft his
24 Last Will and Testament, he expressed to them his inten-
25 tions with respect to his art collection and how it should

Opening Statement on Behalf of Respondent

1 be disposed of. It is their contention that he expressed
2 to them that his desire was that he wanted his surviving
3 spouse to have the greatest possible flexibility with
4 respect to the art collection. I believe counsel's opening
5 statement used the term "wanted her to have the whole
6 bundle of rights". She could do -- have as many options
7 as possible. But it is more clearly stated in their
8 previously submitted memorandum, I refer to pages 3 and 4
9 of the trial memorandums where they state "the decedent's
10 primary intent was to provide his wife with a maximum
11 number of options with respect to the disposition of his
12 collection." The bottom of page 3 they state "on several
13 occasions the decedent expressed his intention to give
14 his wife the option to take any part or all of the bequest
15 in order to provide her with maximum flexibility." At
16 page 2 of the legal memorandum, they again state "their
17 witnesses will testify that the decedent's overriding
18 interest was to give his wife maximum flexibility with
19 respect to his art collection." This then they said was
20 the intent of the testator. And they obviously conferred
21 with him concerning it. I assume they said "all right,
22 fine, we understand what you want and we'll go ahead and
23 draft it and when we have it drafted, we'll bring it
24 back to you, make sure you understand it and if everything's
25 all right, we'll execute it." They then proceed to the

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Opening Statement on Behalf of Respondent

1 drafting stage. And then they say that the draftors came
2 upon a problem. They were concerned with whether or not
3 the provisions of the will would be operable under New
4 York State law. Specifically they were concerned that if
5 they drafted the Will to give the collection to the surviving
6 spouse outright with the power to renounce it in favor of
7 a lesser interest, namely a life estate, that they were
8 concerned that there was some alleged uncertainty under
9 New York State law whether such a provision would be
10 operative. The respondent has no quarrel with this.
11 Surely every attorney drafting a will should be concerned
12 about whether or not the provisions are going to be oper-
13 able under the appropriate state law. They then contend
14 that the draftors decided that they had better be careful.
15 And, therefore, they would look for another way to draft
16 the Will which would still express the intentions of the
17 testator but would not run into any problems with respect
18 to New York state law. And they came up with an alternate
19 form. The form they decided upon was this. They said,
20 "look, we will give her a life estate -- a life use of
21 the entire collection with the power of appointment
22 exercisable within six months. And then if she wants to
23 take it as her outright property, she can do so. If she
24 only wants a life estate -- she has it. Furthermore, we
25 will put in a provision that if she does not want to take

Opening Statement on Behalf of Respondent

1 it into her own possession and furthermore, did not want
2 a life use of it, then she can renounce the life use and
3 have it go to charity. Then she has all her options, all
4 the flexibilities the testator desired and with no problem
5 with the New York state law. And, furthermore, it is our
6 opinion that it qualifies for the marital deduction under
7 2056D." All their problems have been solved. They take
8 this draft form back to the testator. And to be sure,
9 they knew exactly how they were drafting it. And, again,
10 they point this out in the memorandum. They refer to
11 page 3 of the trial memorandum. So they state, "the Will
12 was drafted in the form of a life estate with the unquali-
13 fied right to take absolute ownership." Again on page 4
14 of the legal memorandum, "one of the witnesses will
15 further testify that the Will was drafted in its final
16 form because the technical requirement of the New York
17 law relating to renunciations were not clear at that time.
18 In view of the unsettled state of the law the decision
19 was made to utilize a six month provision in testator's
20 Will in order to be certain that any renunciation or
21 election would be valid in a New York law." So they knew
22 exactly what they were doing. They had a very weighty
23 reason for doing what they were doing. But there was no
24 ambiguity or unclearness as to what they were doing. They
25 knew fully well they were giving her a life estate with

Opening Statement on Behalf of Respondent

1 a power of appointment. And there was a reason why they
2 wanted to do it that way. They didn't want to have any
3 problems with the New York State law. And, apparently,
4 they were also satisfied that they would not have any
5 problems with the Federal estate tax law either. But at
6 any rate, they take a package back to decedent, explain
7 it to him, say to him, "we think we have exactly what you
8 want -- it gives your surviving spouse exactly the flexi-
9 ability you expressed to us, furthermore, we want to do
10 it this way because it gets around the problem of state
11 law and, furthermore, you don't have to worry about the
12 marital deduction. Because this form will qualify." The
13 testator reads it, says, "it's a nice job -- just exactly
14 what I wanted. She has all the flexibility I intended --
15 where do I sign?" The testator executes the Will, and
16 later dies. The Will is admitted to Probate, the Circuit
17 Court has no problem interpreting it, since it's exactly
18 what it says, the wife proceeds under the expressed
19 provisions under the Will to execute her power of appoint-
20 ment and execute her renunciation of the life estate in
21 the remaining works of art of which she has not appointed
22 to herself. No problem at all. Everybody is happy. How-
23 ever, this then is the testimony which the petitioners
24 ask leave to put before the Court. Now the question is
25 two things. One -- is it admissible, and secondly -- if

Opening Statement on Behalf of Respondent

1 admissible, what does it prove? It is the respondent's
2 firm position that it is in no way admissible. Which is
3 where we get into the area of the law concerning when a
4 Court is permitted to receive evidence concerning the
5 surrounding circumstances -- the drafting of a testator's
6 Will, including the testator's intentions. No question
7 that there are occasions when a Court can take such
8 testimony. The rule as to why they don't normally do it
9 is obvious, of course. Because if they did, then you would
10 have a Will that was part-written and part-oral. You would
11 have an endless line of litigants come in and say, "well,
12 regardless of what the Will says, on any number of
13 occasions the testator told me he wanted me to have such-
14 and-such. And because that was his intent, I should have
15 it." Obviously, you simply can't function that way. The
16 Courts have said, "if possible, you must draw the testator's
17 intent from his Will, however, there are occasions when
18 the testator's Will may be ambiguous -- or be unclear as
19 to one of three things. One -- who is to get something.
20 Two -- what are they to get, or three -- when are they
21 to get. These are important things because a Circuit
22 Court must administer the Will -- must apply the Will and
23 have to know these things. And if it's not clear in the
24 Will, what better place to look than to any evidence
25 concerning the testator's intent. If that can show them a

Opening Statement on Behalf of Respondent

1 way to implement the Will. The respondent has no quarrel
2 with that. Of course you, under those circumstances, you
3 can admit testimony as to the testator's intent. However,
4 the testimony which the petitioners want to put before the
5 Court is not testimony as to what his intent was -- as to
6 who he wanted to give something to -- what he wanted to
7 give them or when he wanted them to get it. The Will is
8 in precise conformity with what the intentions were on
9 those three items. He had no quarrel with his wife being
10 the beneficiary. He had no quarrel with her having the
11 option to take an outright or have a life use or renounce
12 the life use. He has no quarrel with when she got it.
13 Their evidence is simply to his intent as to what he wanted
14 the legal consequences to be with respect to Federal
15 estate taxes. All they want to put before the Court is
16 the fact that he wanted the marital deduction. Well,
17 fine, but that's not relevant to our determination. Not
18 a question of what he wanted or what he intended. The
19 question is -- does what he did qualify under the code
20 for that treatment. The petitioners also say and are
21 correct in saying that besides evidence directly of intent,
22 the Courts may also take evidence of surrounding circum-
23 stances. But the only situation of which the Courts are
24 permitted to do that -- is to show that although a Will
25 on its face is clear, when the language of that -- when

Opening Statement on Behalf of Respondent

1 the clear language of that Will is taken in reference to
2 some other extrinsic circumstance, it no longer becomes
3 clear. A very good example is set out in petitioner's
4 legal memorandum where they said -- where they cite a
5 case where the language of the Will was that -- the
6 testator wanted to leave, I believe to a son or daughter,
7 100 shares of a certain company. Now is it -- which seems
8 clear enough on its face. However, evidence was presented
9 to show that in the period between the drafting of the
10 Will and the testator's death that 100 shares had received
11 stock dividends and stock splits so that at the time of
12 his death, that original 100 shares now represented 250
13 shares. So obviously, there is a problem for the Circuit's
14 Court. How much is the son or daughter supposed to receive?
15 100 shares or 250 shares. So that the -- surrounding
16 circumstances are permitted if they will show -- are
17 relevant to show an ambiguity which would not otherwise
18 be disclosed. And once that ambiguity is established,
19 then the Court can again go to the intent of the testator --
20 if such evidence exists to determine how he would have
21 intended the situation to be handled. But the testimony
22 which petitioners ask to put before the Court does not
23 raise any such ambiguity. The testimony of the surrounding
24 circumstances they want to present, simply establishes
25 the reasons for which they drafted the Will as they drafted

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1 it. But it does not raise any doubt as to what they
2 meant when they drafted it. They still meant to give
3 her all her options. All her bundle of rights -- which
4 they did. The fact that they had some weighty reason for
5 it is of no relevance whatsoever. We would assume that
6 they would have a reason for drafting it the way they
7 drafted it. Hopefully, every lawyer has a good reason
8 for drafting a legal document precisely the way he drafts
9 it. So on this ground, it is our position that the
10 evidence is totally inadmissible because the only conflict
11 that points up is simply the possible contradiction between
12 the actual legal consequences of the Will and the intended
13 legal consequences of the Will. And even there we don't
14 as yet have a real conflict. Because the petitioners
15 may be correct. Maybe the Will as drafted does qualify
16 for the marital deduction.

17 THE COURT: So as you analyze the Will, the
18 decedent gave his widow a life estate plus a general
19 absolute power of appointment.

20 MR. PHALIN: That is correct.

21 THE COURT: It has been some time since I
22 analyzed Section 2056 B5 which deals with the life
23 estate with the power of appointment in the surviving
24 spouse. Is there any particular reason why that section,
25 then, would not fit this case?

Opening Statement on Behalf of Respondent

1 MR. PHALIN: Yes, Your Honor, there are specific
2 requirements that the power of appointment in order to
3 qualify for the marital deduction must be exercisable
4 throughout the lifetime of the holder of the party. If
5 it's exercised for only a limited period -- it's then only a
6 terminable interest. Because at the end of that limited
7 period, it lapses.

8 THE COURT: Here in this case the widow is
9 required to exercise the power within six months?

10 MR. PHALIN: That is correct, Your Honor.

11 THE COURT: Well, I have -- I have read the
12 briefs submitted by the parties and I have concluded that
13 I should hear the testimony concerning the background
14 facts and the circumstances known to the decedent when
15 the Will was made. I think the issue is a close one
16 and it may very well be that upon consideration of the
17 case, an opportunity to study the precedents that I would
18 conclude that the testimony should not be considered.
19 But I think the most reasonable thing for me to do at
20 this time is to hear the testimony and I don't think that
21 hearing the testimony will so contaminate my mind that I
22 will be unable to reach a fair and reasonable decision
23 in the case if I conclude that it should not be considered
24 in reaching the Court's decision.

25 MR. PHALIN: Thank you, Your Honor, may I have a

70a

1 moment, please?

2 THE COURT: Yes.

3 MR. PHALIN: Your Honor, could the parties
4 approach the bench, please?

5 THE COURT: Yes.

6 (Off the record)

7 MR. PHALIN: The respondent has nothing further
8 on his opening statement.

9 THE COURT: Very well.

10 MR. IMBERMAN: Your Honor, I would just like to
11 briefly make one or two comments. I don't intend an --
12 extended reply. But I do want to say that opposition
13 is that this is not a power of appointment. I'm not going
14 to argue that -- I think it's much better for everyone
15 concerned if we brief the point to Your Honor. And --

16 THE COURT: Now would you be willing to specify
17 the provisions of Section 2056 that you rely upon. You
18 have mentioned 2056D --

19 MR. IMBERMAN: Yes.

20 THE COURT: -- specifically. Do you rely upon
21 2056A which is the general provision regarding the
22 allowance of the marital deduction?

23 MR. IMBERMAN: Could I consult with my expert
24 on that, Your Honor? 2056A and D, Your Honor.

25 THE COURT: Very well.

1 THE CLERK: Could you please stand and raise your
2 right hand? You do solemnly swear that the testimony you
3 are about to give the Court in this case shall be the truth,
4 the whole truth, and nothing but the truth, so help you
5 God?

6 THE WITNESS: I do.

7 THE CLERK: Be seated and state your full name
8 and address for the record, please.

9 THE WITNESS: Alan Rosenberg, 115 Central Park
10 West, New York.

11 ALAN ROSENBERG,
12 called as a witness, having been duly sworn, took the
13 stand and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. IMBERMAN:

16 Q Mr. Rosenberg, are you a member of the New York
17 Bar?

18 A I am.

19 Q When were you admitted to practice in the state?

20 A 1955.

21 Q And would you please for the record tell us
22 the name of the firm for which you are a member?

23 A Proskauer, Rose, Goetz and Mendelsohn.

24 Q And for how long have you been associated with
25 the firm?

1 A Since 1957.

2 Q And how long have you been a member of the firm?

3 A Since 1967.

4 Q Do you specialize in any field of law, Mr.

5 Rosenberg?

6 A Yes, I specialize in the tax field.

7 Q Did you know the defendant, Ludwig Neugass?

8 A I did.

9 Q And in what connection did you first meet him?

10 A I met him when he came in to consult with me
11 concerning his Will.

12 Q And approximately when was that?

13 A It was shortly prior to -- 1967 -- 1968 or 1967.

14 Q And did you meet him at your office?

15 A Yes, I did.

16 Q How many times did you meet with him before the
17 Will was drafted?

18 A I met with him two, three or four times.

19 Q And can you tell the Court whether Mr. Neugass
20 was particularly tax conscious?

21 A He was extremely tax conscious. He had had
22 a considerable amount of tax-oriented planning done at
23 the time we had seen him.

24 Q Yes.

25 A He had, for example, a pension trust that had

1 been set up before the time that we had seen him and he
2 had an insurance trust and it was quite clear that he was
3 very tax-oriented.

4 Q Uh-huh. Did you have a discussion with Mr.
5 Neugass concerning his estate plan?

6 A I did.

7 Q Would you just tell us generally the things that
8 were mentioned during the discussion?

9 A Well, the discussion --

10 MR. PHALIN: Objection. Your Honor, could we
11 know when and where -- which conference we are talking
12 about. Said he met him two or four times.

13 THE COURT: I sustain the objection.

14 MR. IMBERMAN: Could you tell us when you had
15 these discussions about the estate plan and where they
16 took place?

17 A They took place in my office and they took place
18 early in 1967.

19 Q Now could you tell us the discussions of the
20 subject matter of these discussions concerning his estate
21 plan?

22 A Well, the type of discussion that we had was
23 a general review of all of his assets -- the type of
24 assets he had -- estimates as to the value of the assets
25 that he had and what he wished to do with the assets. In

1 other words, the objects of his bounty -- where he wanted
2 his assets to go with the idea of formulating a suitable
3 plan for him.

4 Q And did he tell you who the principal objects
5 of his bounty were?

6 A The principal objects of his bounty were his
7 wife and his -- his daughter.

8 Q And was there a discussion with him as to the
9 best way to accomplish the desires which he had?

10 A Well, in our initial discussion he told me what
11 he wished to do and as a result of that discussion, I
12 took the information and then with a thought of discussing
13 it with people in our Estates Department who have the
14 primary function of drafting wills to come up with a suit-
15 able plan for him. He indicated that he had a huge art
16 collection -- the value of which was known or estimated
17 at that time but the value which in the future was uncertain.
18 And he considered this to be a complicating factor in his
19 estate because with respect to the art, how that -- first
20 of all he didn't know whether he wanted it to go to his
21 wife or set up a foundation for it. He thought he had a --
22 huge collection which he might want to keep intact. Now
23 what he told her -- what he wanted to do was get as much
24 flexibility with respect to this art collection as possible.
25 He was concerned that the estate taxes on the art could

1 have it -- could deplete other assets in the estate.

2 So he was concerned that that be very carefully handled.

3 Q And what did you actually do about preparing the
4 Will, if any.

5 A I did not prepare the Will. I discussed it with
6 people in our Estates Department who then prepared the Will.

7 Q Fine, and did you then get it back?

8 A Yes, I did.

9 Q And did you discuss it with Mr. Neugass?

10 A Yes, I did.

11 Q And could you tell me generally what you told
12 him that Will accomplished -- particularly in connection
13 with the art collection.

14 A Well, what I did was -- I went through every
15 provision of the Will and explained how it fit into the
16 purposes as I had understood them and with respect to the
17 art, I told him that the provisions, although complicated,
18 did accomplish what he wanted in that they did give complete
19 flexibility to his wife with respect to the art. That
20 she could take it herself, she could use it herself or
21 if she did not want to have it, she could then -- then the
22 art would be given to his daughter to take if she wanted
23 the art, and if neither one wanted the art, then it could
24 go to a charitable foundation with the idea that under
25 those circumstances, it would go to the foundation free

1 of tax and that the tax on the art would not eat up the
2 rest of the estate which the family needed to live on.

3 Q Was there a discussion with him about the estate
4 taxes that there might be in connection with this Will?

5 A Yes, there was. We pointed out to him that the
6 Will was drafted with the intention of minimizing the
7 taxes to give the widow the full marital deduction so
8 that she would have as much available to her to support
9 her for her life as possible.

10 Q And was this in accordance with the intentions
11 he had communicated to you?

12 A Yes, he was satisfied with the Will. He was
13 satisfied with my explanation of the Will and after the
14 explanation he proceeded to execute it.

15 Q And did he subsequently sign the Will?

16 A Yes, he did.

17 Q I have no further questions.

18 MR. PHALIN: Your Honor, before I begin cross
19 examination, I would like to renew or restate my objection
20 obviously from the testimony of this witness -- what the
21 Will expressed was exactly what the testator expressed
22 to the drafter.

23 THE COURT: Very well, I'll note your objection.

24 MR. PHALIN: Thank you.

25

1 CROSS EXAMINATION

2 BY MR. PHALIN:

3 Q Mr. Rosenberg, would you state to the Court
4 what, if any, particular legal education -- legal educational
5 background you have in the tax area?

6 A I graduated from the Columbia Law School and
7 then I have a Masters of Tax Law which I received from
8 N.Y.U.

9 Q Thank you. You've testified that when the Will
10 had been completed -- the drafting had been completed --
11 you went over it.

12 A Yes, I did.

13 Q Is it true that you were satisfied that the
14 Will provided for exactly what the testator had told you
15 he wanted done with the art collection?

16 A Yes.

17 Q No question in your mind that's what he wanted?

18 A That was my understanding and that's what I
19 communicated to him and he was satisfied.

20 Q So that you explained all the provisions to
21 him?

22 A Yes, I did.

23 Q And he was also satisfied with that provided
24 for the art collection exactly in the manner he desired?

25 A Yes, in that what it did was give the wife the

1 complete control of the art collection which is what he
2 wanted.

3 Q Thank you.

4 A So that all decisions with respect to it could
5 be made after his death.

6 Q Thank you. Did you then review the provisions
7 of Article 5th of the Will -- pertaining to the disposition
8 of the art collection with respect to the marital deduction
9 under Federal estate tax laws?

10 A Do you mean -- did I explain the technical --

11 Q No, did you yourself?

12 A No, I did not.

13 Q Were you concerned yourself as to whether or
14 not the provisions concerning the disposition of the
15 art collection would qualify for the marital deduction?

16 A I was not concerned. I anticipated that they
17 would fully qualify for the marital deduction. Let me
18 explain that the Will was prepared by our Estates Depart-
19 ment and --

20 Q But you are the tax expert, aren't you?

21 A I am a tax expert in terms of planning but
22 I'm not an expert in drafting wills.

23 Q Well --

24 A And I did not draft the Will.

25 Q The man who drafted the Will -- is he an expert

1 in Federal tax law?

2 A Yes, he was.

3 Q So that -- would it have been his responsibility
4 to review it for estate tax purposes?

5 A Yes, it would.

6 Q What then was the purpose of your review?

7 A Because it was my client. I reviewed it -- the
8 client came in to me -- the client expressed his intentions
9 to me so, naturally, I met with the client to explain
10 to him that the Will covered his intentions and I thought--
11 I told him -- carried out the objectives that he wanted
12 carried out by the Will.

13 Q And did you tell him also that in your opinion
14 it would qualify for the marital deduction?

15 A Yes, I did.

16 Q And what did you base that expression of opinion
17 on?

18 A On the basis of the fact that the Estate Depart-
19 ment planned the Will and planned it to give the maximum
20 tax savings to him including the marital deduction. I
21 did not independently review the Will in terms of the tax
22 statute. That was not my function.

23 Q So you merely assumed that it would qualify?
24 You did not as a matter-of-fact satisfy yourself that
25 in your opinion it would.

1 A That's correct.

2 Q Mr. Rosenberg, you testified that you met with
3 the testator from two to four times. Did you make any
4 written record of those interviews?

5 A I customarily make memorandum of interviews and
6 I am sure that there are some memorandums in our files.

7 Q Did you make any other written records concerning
8 his estate tax plan?

9 A I don't recall at this moment. There may be
10 some correspondence to him but I did not review it to
11 see if there was.

12 Q And would they also be in your file?

13 A If there was correspondence, they would be in
14 our files.

15 Q At this time, Your Honor, we request that that
16 file be made available to respondent to review and the
17 record held open to continue cross examination of this
18 witness upon completion of that review.

19 MR. IMBERMAN: If Your Honor please, I object
20 to counsel's request for a wholesale right to rummage
21 through our files. But if specific documents are requested
22 and Your Honor feels that those specific documents are
23 appropriate for review, why, I will be glad to look through
24 the files, but I don't think it's right for him to say,
25 "show me your file".

1 THE COURT: Well. Let's handle the matter this
2 way. Mr. Phalin, you proceed with your cross-examination
3 to the extent that you feel that you can at this time.
4 And I would ask that the memoranda of interviews prepared
5 by counsel at the time you talked with the decedent together
6 with correspondence with the decedent regarding the inter-
7 pretation and application of the Will be made available to
8 counsel for the respondent for examination. It seems to
9 me that enough time has lapsed here to where that that
10 correspondence would be a much more reliable guide as
11 to the advice which was given and perhaps the recollection
12 of the witness unless the witness reviewed that correspon-
13 dence in advance. And as I understood his testimony to
14 be that he did not review the letters. Now I'm not sure
15 that he was asked did he review the memoranda which he
16 prepared. Did you review the memorandum --

17 THE WITNESS: Yes, I did.

18 THE COURT: -- in advance of your testimony
19 this morning?

20 THE WITNESS: Yes, I did.

21 THE COURT: Very well. So your testimony reflects
22 the contents of those memoranda?

23 THE WITNESS: Well, the memoranda, of course,
24 did not include all of the discussions that we had. It
25 was just more or less as a guide to the people in our

1 Estates Department for preparing the Will. There is a lot
2 more that does not reflect in that and there were several
3 conversations with people in the Estates Department with
4 respect to preparing the Will.

5 THE COURT: Since he reviewed the memoranda
6 in preparation for his testimony, it seems to me that
7 the memoranda should be produced.

8 MR. PHALIN: Thank you, Your Honor. And for
9 present purposes, Your Honor, I've gone as far as I can
10 with cross examination at this time.

11 THE COURT: Very well.

12 MR. IMBERMAN: We couldn't get the memoranda
13 down here, Your Honor, until this afternoon.

14 MR. PHALIN: I would suggest, Your Honor, that
15 we go ahead with the next witness and see what additional
16 problems may arise with that witness and then we can
17 handle it all at once.

18 MR. IMBERMAN: I have no objection to that. I
19 take it that you are finished with your cross examination
20 subject to anything you may find in the memoranda?

21 MR. PHALIN: That is correct.

22 MR. IMBERMAN: Very well.

23 THE COURT: It's possible that on reviewing
24 the memoranda, it will not be necessary to cross-examine
25 the witness further. It may be --

1 MR. IMBERMAN Fine.

2 MR. PHALIN: That is correct, Your Honor.

3 MR. IMBERMAN: All right, you may step down.

4 THE WITNESS: Do you want me to step out?

5 MR. IMBERMAN: Your Honor, since the witness
6 has finished with his testimony, can he sit in the court-
7 room?

8 MR. PHALIN: There is a possibility he may be
9 recalled, Your Honor.

10 THE COURT: In view of the fact that he may be
11 recalled, I believe it would be appropriate for him to
12 leave the courtroom.

13 THE CLERK: Raise your right hand. You do
14 solemnly swear that the testimony you are about to give
15 the Court in this case shall be the truth, the whole
16 truth, and nothing but the truth, so help you God?

17 THE WITNESS: I do.

18 THE CLERK: Be seated and state your full name
19 and address for the record, please.

20 THE WITNESS: My name is Ira H. Lustgarten.
21 L-u-s-t-g-a-r-t-e-n. I reside at 200 Glendale Road,
22 Scarsdale, New York.

23 IRA H. LUSTGARTEN,
24 called as a witness, having been duly sworn, took the
25 stand and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. IMBERMAN:

3 Q Mr. Lustgarten, you are an attorney admitted to
4 practice in New York?

5 A I am.

6 Q And when were you admitted?

7 A 1958.

8 Q And are you a graduate of the Columbia Law
9 School?

10 A I am.

11 Q And did you graduate that same year?

12 A Yes, I did.

13 Q Could you please tell us for the record the
14 name of the firm with which you are associated?

15 A For the years from 1953 through 1968, I was
16 associated with the firm of Proskauer, Rose, Goetz and
17 Mendelsohn, and I became a member of that firm in 1968.

18 Q Are you still are a member?

19 A Yes, I am.

20 Q Now, Mr. Lustgarten, could you please tell us
21 briefly what you have done since graduating from law
22 school in 1958 and the practice of law with particular
23 emphasis on your specialty in estate law?

24 A Well, from about 1970 to the present, I have
25 been involved principally in estate planning, estate

1 administration, pardon me, and in the law generally
2 involving philanthropic organizations. I am currently
3 on the faculty at the Columbia Law School where I lecture
4 in Estate Administration. I am a member of the committee
5 on Trust Estates in the Circuit Court of the Association
6 of the Bar of the City of New York, am a member of the
7 Executive Committee of the Trust and Estate Section of
8 the State Bar Association. I am a fellow of the American
9 College of Probate Counsel. I am on the Legacy Development
10 Committee of Columbia University -- I lecture for the
11 Practising Law Institute and that's about it.

12 Q Mr. Lustgarten, did you have any thing to do
13 with the preparation of the Will of Ludwig Neugass?

14 A I did.

15 Q Could you tell the Court -- first of all, with
16 whom did you have your original contact in connection
17 with the preparation of that Will?

18 A Mr. Rosenberg.

19 Q And could you tell us generally what Mr. Rosen-
20 berg told you with regard to the assets of Mr. Neugass
21 and what he wanted done.

22 A Mr. Rosenberg described in general terms his --
23 specifically -- where he knew specifics the nature of Mr.
24 Neugass' assets. He told me that there were various
25 securities, various business interests -- that there was

1 an art collection which was difficult to value on the
2 basis of the information available at that time. He told
3 me that Mr. Neugass had a wife and a daughter -- the
4 daughter had children. He described Mr. Neugass' interest
5 in doing as best he could by his wife who was the primary
6 object of his bounty and his daughter, of course, was the
7 lesser object, gradual and coming behind that. He told
8 me that we wanted to have a Will which would qualify for
9 the marital deduction. He told me that Mrs. Neugass had
10 been ill and that the status of her health was uncertain.
11 He told me that to the extent possible, we should strive
12 for the maximum flexibility in the estate plan consonant
13 with the law of New York and the provisions of the Internal
14 Revenue code.

15 Q Was -- are you finished?

16 A Yes.

17 Q And was this discussion with regard to flexibility
18 specifically in connection with the art collection?

19 A Basically, yes. The idea was that -- at this
20 time Mr. Neugass was pretty much up in the air with
21 regard to the art collection. He, as described to me,
22 did not know the extent to which, if at all, he might
23 be making charitable contributions of the art during his
24 lifetime. He wanted -- if this question was not resolved --

25 MR. PHALIN: Your Honor, I would like to raise

1 an objection here --

2 THE WITNESS: Okay.

3 MR. PHALIN: -- Based on hearsay since the witness
4 said that he did not talk directly with the testator and
5 he is testifying as to what Mr. Rosenberg told him and Mr.
6 Rosenberg has already testified.

7 THE COURT: As I understand it, he is summarizing
8 the instructions which he received from Mr. Rosenberg
9 concerning the preparation of the Will.

10 MR. IMBERMAN: That is correct, sir.

11 THE COURT: I'll overrule the objection.

12 THE WITNESS: Not knowing whether the art or
13 the disposition of the art would be resolved by him
14 during his lifetime, the instructions that I received
15 were to provide that Mrs. Neugass would be -- have all
16 of the options that he had during his lifetime vis-a-vis
17 the art collection. The options that I discussed with
18 Mr. Rosenberg were her taking the entire art collection,
19 her having a life estate in the art with remainder to
20 charity which under the law as it existed before the
21 '69 Tax Reform Act was perfectly all right. Her being
22 able to disclaim and then give the same sort of options to
23 her daughter with the ultimate charitable beneficiary
24 being a foundation that either -- had just then been
25 organized or about to be organized. I don't recall which.

1 MR. IMBERMAN: May I have a copy of that stipu-
2 lation? Mr. Lustgarten, I have put in front of you a copy
3 of the Will of Mr. Neugass and I ask you to look at Article
4 5th in particular and to tell us why the article was
5 drafted in this particular manner. And in answering,
6 would you please focus on why the Will did not give Mrs.
7 Neugass the art collection outright with the right to
8 renounce any part of it and why did you put the six-month
9 provision in Article 5th -- during which time at or the
10 six-month period after Mr. Neugass' death during which
11 time his widow could renounce the life estate and elect
12 to take outright ownership?

13 MP. PHALIN: Objection, Your Honor, I don't think
14 it has been established that this witness did, in fact,
15 put any provision into this will.

16 THE COURT: Did you draft the Will?

17 THE WITNESS: I did, Your Honor.

18 THE COURT: Very well. I will overrule the
19 objection.

20 MR. IMBERMAN: Thank you, Your Honor. I apologize
21 for not having asked that preliminary question.

22 A In order to respond to your question concerning
23 Article 5th, I think it's necessary to review just very,
24 very briefly the State of New York law in 1967 when this
25 was being done. The Courts had held and the citations

1 are available but basically in Hardenbergh, I suppose,
2 that -- you could not renounce an intestate share without
3 making a taxable gift because an intestate share was
4 deemed to have vested on death unless there was some state
5 law which provided for renunciation procedure. It certainly
6 was the law of New York that somehow or other you could
7 renounce a testamentary disposition and in a testamentary
8 disposition where there was a renunciation, there was not
9 a taxable gift and that had been determined, I guess in
10 Brown against Rutzahn. In 1964, the New York legislature
11 -- responded to this line of cases by adopting
12 decedent estate law, section 87A which subsequently was
13 "recodified" as part of the estates powers and trust
14 law of New York as Section 4-1.3. That dealt with
15 renunciation of intestate shares and in DEL 87A and its
16 successor statute, there was provided a mechanics for
17 such renunciation which included a time frame within
18 which renunciation had to be accomplished -- which was
19 six months from the grant of letters of administration.
20 As to the renunciation of testamentary provisions at that
21 period, there was no clear law in New York as to a variety
22 of things. It was unclear what constituted a timely
23 renunciation whether you could have a partial renunciation
24 either quantitatively or qualitatively and quantitatively I
25 mean renouncing a portion of a bequest or a portion of

1 a will -- take this but leave that and so on. That was
2 unclear. It was also unclear whether you could renounce
3 qualitatively -- renouncing a fee interest to a lesser
4 interest to a life estate, for example. Now the renunciation
5 situation with regard to testate matters remained unclear
6 until 1971. In 1971, the legislature adopted EPL 3-3.10.
7 And even though that was adopted in '71, supposedly to
8 clarify the law of testate renunciation, it was still
9 a troubled and unsettled area in New York with the Circuits.
10 certainly in wide variance between various counties as
11 to the way it works. But the point I would make is that
12 where as EPL 4-1.3 was adopted to create a right -- the
13 right to renounce an intestacy -- EPL 3-3.10 was created
14 to clarify a right that everybody knew existed but didn't
15 know how to cope with it. With that background, I will
16 go on to answer your question. As to why the Will did
17 not provide outright request with the right to renounce --
18 it was because it was not at all certain that renunciation,
19 as such, could be had in a testate situation with regard
20 to a portion of the collection. One of the options that
21 it was sought to leave with Mrs. Neugass was the option
22 to have a life estate with remainder to charity. In part,
23 this was because of the -- well, I then understood to
24 be the tenuous nature of her health. And it was also
25 unclear, as I said, whether you could renounce from a

1 fee to a lesser possessory estate. However, in terms of
2 election, all of this renunciation law didn't come in to
3 -- to bother the plan. And it seemed to me at the time,
4 and still does, that there -- it is much akin to being
5 offered an apple and an orange. And you can say, "here's
6 an apple and an orange. Take one or the other of them.
7 And if you take the apple, you are rejecting, disclaiming,
8 renouncing the orange" --if you are limited to one choice
9 or the other. It is for that reason that the art collection
10 was not left outright with a power of renunciation because
11 we didn't know where that would lead to under the law of
12 New York. The six-month provision is clearly derived from
13 what was then the only indicia of renunciation, dis-
14 claimer of election or what have you -- that there was in
15 the State of New York. All that then existed was the
16 statute that had been adopted in 1964 which said that
17 if you were going to do this -- you had to do it within
18 six months after the grant of letters of administration.
19 Parenthetically, I would note that when in 1971 the law
20 was clarified as to testate renunciation for whatever
21 reason they put in a one-year period from the date of
22 letters testamentary or the date the Will is admitted to
23 Probate. Now the six months from the letters of adminis-
24 tration, obviously, could have been longer and almost
25 always certainly have been longer than six months from

1 the date of death. And there is a provision in 2056 B3
2 of the Internal Revenue code which imports a -- you can
3 provide for a survivorship of up to six months from the
4 date of death and still qualify for the marital deduction.
5 This is in very general terms but I am certain everybody
6 in this room is familiar with the substance of the provision.
7 And so given six months under the New York law as the most
8 analogous time period given the starting point of date of
9 death under the most analogous provision of the Internal
10 Revenue code. The time that was set forth in this instru-
11 ment was six months from date of death.

12 Q And -- did the Will as drafted by you as far
13 as you are concerned comply with all of the instructions
14 that you had received from Mr. Rosenberg? As to what
15 your --

16 A I certainly believe that it did, sure.

17 Q -- including giving the widow this flexibility
18 and the right to have everything including the outright
19 provision?

20 A It was my understanding and what I was attempting
21 to do that we were giving her the whole -- to use the
22 law school phrase -- bundle of rights and the bundle
23 of sticks.

24 Q While at the same time giving the estate the
25 marital deduction?

1 A Yes, or ever conceivably had she so gave that
2 way a charitable deduction after her life estate -- had
3 that been the way it worked out.

4 Q I have no further questions.

5 CROSS EXAMINATION

6 BY MR. PHALIN:

7 Q Mr. Lustgarten, I take it you hold yourself
8 out as an expert in New York State Probate law.

9 A To the extent permitted by the canons of
10 ethics, I suppose.

11 Q You also hold yourself out as an expert in
12 Federal tax law?

13 A Generally, no. In the area of estate tax law,
14 gift tax law, judiciary income tax, the law having to
15 do with private foundations, I suppose, yes, but certainly
16 not in corporate partnership or other areas.

17 Q What is your educational background with
18 respect to Federal tax law?

19 A Well, I attended the Columbia Law School. I
20 took most of the courses then available at the law school
21 in this general area.

22 Q What courses were those, sir?

23 A Gee, I really don't remember. I know I took
24 a tax course. I certainly took an awful lot of estate
25 courses. I know that I took an awful lot of real property

1 courses to the extent that I was in any area of the law
2 that is generally denominated as "estates". I suppose I
3 could go back and dig out a transcript and identify the
4 particular courses but I really don't know. From the
5 time of graduation until this time, I have certainly
6 attempted by attending all the various fora, PLI seminars,
7 work shops, estate discussion groups and so on that I
8 could get to and by reading the materials, I guess, to
9 keep myself apprised of this. This year I will deliver --
10 or be a part of a four-person work shop panel in New York
11 and New Orleans on planning for the large estate and I
12 guess somebody who selected me for that has some -- feel
13 that I do know the area.

14 Q Now am I correct in assuming that you do not
15 have any graduate educational experience in Federal tax
16 law?

17 A That is absolutely correct.

18 Q Would you state to the Court what your relation-
19 ship in the firm was to Mr. Rosenberg to the time he
20 drafted the will in question.

21 A I was an associate in the firm who had been
22 there, let's see, for nine years at that time. I believe
23 that Alan had become a member of the firm a year or so
24 before but I'm not sure. I think he was a member of
25 the firm at that time.

1 Q And you worked in different departments -- in
2 different areas?

3 A Yes.

4 Q What was he doing?

5 A He is in the Tax Department.

6 Q And what was your area?

7 A The Estates Department.

8 Q Did you do any amount of legal research preparation
9 for the drafting of the will?

10 A I can't recall. My -- my recollection would
11 be no, but I can't recall.

12 Q Well, I -- you have gone to some extent about
13 this complex problem of New York State law. Did that
14 not require some research?

15 A Much of that required discussion with my seniors
16 in the department and a general knowledge that this was
17 a matter of concern. I think probably that there was
18 research done in the office in the area of renunciation
19 and, perhaps, other estate planning or estate administration
20 contacts. But I couldn't say that any was done that was
21 specific to Ludwig Neugass. And it would be my recollection
22 that this was a matter of discussion with people who had,
23 perhaps, looked into it. The things that I had heard in
24 discussions in the office and outside of the office among
25 lawyers who were concerned with this problem -- but I don't

1 recall any research being done specific to the planning
2 of Mr. Neugass' estate.

3 Q What did you then do -- just sit down and draft
4 it?

5 A Of course. I sat down and did a first draft.
6 And then I did a second draft and a third draft and many
7 other drafts. And the drafts were read by various people.
8 And comments were made. And this is the process.

9 Q Well, who besides Mr. Rosenberg reviewed your
10 work?

11 A I am certain that other people because of our
12 procedures internally in the firm read the Will because
13 right now it is our office practice and always has been
14 our office practice that a partner has to review these
15 documents. So some partner, and I couldn't say who --
16 other than Mr. Rosenberg, reviewed the document because
17 at that time I wasn't a member of the firm. I couldn't
18 say who did it because I don't believe that we keep any
19 sort of checklists as to who has seen every document.
20 But I know at that time in my life, it would have had
21 to have been reviewed.

22 Q Is it also true that you did not do any original
23 research with respect to whether or not the provisions
24 of the Will qualified for the marital deduction under
25 Federal estate tax law?

1 A Are you talking about with regard to this
2 particular Will?

3 Q In regard to this particular Will.

4 A It is likely to be true, yes.

5 Q That you did not do any research.

6 A That is likely to be true.

7 Q Did you satisfy yourself that, in fact, in your
8 opinion the provisions would qualify for the marital
9 deduction?

10 A Obviously, I satisfied myself and others or
11 else the Will would not have been executed in accordance
12 with our procedures from the office because it wasn't
13 only a question of satisfying myself -- it was a question
14 of satisfying my seniors. And I think, certainly, all
15 of us had to before the document was sent out for
16 execution or was executed had to be satisfied -- that it
17 would qualify for the marital deduction or else the document
18 wouldn't have been drawn that way.

19 Q Well, what I'm asking, sir, would that have been
20 one of your fundamental responsibilities to insure that
21 it did qualify or did someone else, upon review, consider
22 that matter?

23 A No, it would have been my responsibility and
24 whoever was reviewing the instrument. And I can't say
25 that either one of us would have had a primary responsibility.

1 Q And you are saying that having drafted it -- it
2 simply appeared to you upon a reading that it would qualify?
3 Based on your general knowledge, I take it, of Federal
4 estate tax law.

5 A It was drafted in such a way that it would
6 qualify in our opinion. It's not a question of -- I
7 drafted it and then read it and decided whether it would
8 qualify or not.

9 Q What was that opinion based on?

10 A What was that opinion based on?

11 Q Yes, sir.

12 A The opinion was based upon what I understood to
13 be the provisions of the Federal tax law as applicable
14 in the State of New York because of this renunciation
15 situation I described.

16 Q But I take it, generally speaking, you didn't
17 go to research it out.

18 A As far as the renunciation in this case, no.

19 Q As far as whether or not it would qualify for
20 the marital deduction.

21 A Well, today I will draw a Will and it will say,
22 "I leave my entire estate outright to my wife." I'm
23 convinced that will qualify for a marital deduction and
24 I don't intend to do any research on it.

25 Q What if you have a Will with a provision as

1 complex as Article 5th of the Will in front of you. Would
2 you assume off of the top of your head that that would
3 qualify?

4 A No, I would not.

5 Q Did you at the time you drafted it?

6 A No, I did not.

7 Q What then did you base your opinion that it did
8 meet the requirements of the code?

9 A You are saying, I think you're putting the cart
10 before the horse because what you're saying is -- there
11 was --

12 Q Please, Mr. Lustgarten, just answer the question.

13 MR. IMBERMAN: Now just a moment, let the
14 witness answer, sir.

15 THE COURT: Let him answer the question.

16 THE WITNESS: Well, I think that there's implicit
17 in your thing that there is a document and then you looked
18 at the document and said -- does this qualify or doesn't
19 this qualify -- which is not the way this is done. The
20 document is drawn in such a way so that in the belief and
21 best efforts of the draftsman, it does qualify. The docu-
22 ment then is looked at by other people. It has been a
23 subject of conversation. Does -- if you are suggesting
24 that it is then to be sent out for research -- the answer
25 is -- no, it wasn't.

1 MR. PHALIN: Mr. Lustgarten, I would like to
2 know -- what were your best efforts at that time? What
3 did you do?

4 A My best efforts at that time were to within the
5 law as I understood it to be -- both Federal and New York
6 law -- to get into this Will the intent of the testator
7 and the marital deduction or alternatively, the charitable
8 deduction.

9 Q Let's approach it another way, Mr. Lustgarten.
10 Did you go and try to find a case involving a provision
11 similar or identical to this one that was held to qualify
12 for the marital deduction?

13 A I don't recall doing that.

14 Q You don't recall doing that? Did you go to
15 the statute and find language which led you to believe
16 that these provisions would qualify?

17 A I don't specifically recall it but I do know
18 that at that time I was familiar with the provisions
19 of Section 2056.

20 Q Did you go to the regulations and find the
21 language which told you --

22 A I don't --

23 Q -- or which led you to believe that would qualify?

24 A I don't specifically recall it but at that time
25 I was familiar with the regulations under Section 2056.

1 Q Did you have any discussion with Mr. Rosenberg
2 as to whether or not the provisions would qualify for the
3 marital deduction?

4 A I don't recall any specific discussion with
5 him as to that.

6 Q Would you please state to the Court what your
7 opinion is today as to whether or not those provisions
8 meets the requirements -- for the marital deduction
9 treatment.

10 A My opinion is that they do.

11 Q And on what do you base that opinion?

12 A My understanding of the law, if you would like
13 the -- if you would like to see this, I am certain you
14 will see it in the post-trial brief.

15 Q What section of the code do you believe entitles
16 those provisions to be treated -- the marital deduction?

17 A 2056.

18 Q And what specific part of 2056?

19 A I would suppose if I were limited, and I am
20 certainly not going to limit myself to a specific part --
21 it would be 2056D.

22 Q Now are you familiar with the expressed provisions
23 of 2056D?

24 A In the regulations?

25 Q I take it you refer to code.

1 A Yes. Well, kay, in the code -- yes.

2 Q What language in 2056D do you believe encompasses
3 the provisions in this Will?

4 A Would you like to furnish me with a copy of the
5 Internal Revenue code?

6 MR. IMBERMAN: Your Honor, may I just -- may I
7 object to --

8 THE COURT: Yes --

9 MR. IMBERMAN: -- the line of questioning at
10 this time.

11 THE COURT: -- I'll sustain the objection.

12 MR. PHALIN: Your Honor, the witness is testifying
13 as an expert in the area of Federal estate tax law. He
14 has expressed his opinion that the provisions of the Will
15 qualify for marital deduction. The respondent is certainly
16 entitled to ask him what basis he had for that opinion.
17 And specifically what basis he has.

18 MR. IMBERMAN: If Your Honor please, it seems
19 to me the ultimate determinate of whether it does or
20 doesn't qualify is Your Honor. And although the witness
21 has testified originally about the facts and circumstances
22 surrounding the Will and why he put this specific language
23 in it -- seems to me counsel is going much too far in
24 the area of cross-examination.

25 THE COURT: I'll sustain the objection.

1 MR. PHALIN: Mr. Lustgarten, why couldn't you
2 have drafted the Will at that time simply to give the
3 collection outright to the wife -- without bothering
4 with the right to renounce. What difference does it make
5 whether she could renounce? Once she gets it -- can't
6 she do anything she wants to with it?

7 A Yes, she certainly can except, perhaps, reserve
8 a life estate on it and have it -- have it be her decision
9 that she -- and get the charitable deduction. No question
10 about it. Except for the reservation of a life use, yes,
11 she could take it with one hand and give it away with the
12 other hand. Certainly.

13 Q Of course, what was the problem?

14 A Could she have reserved the life use at that
15 time?

16 Q Would it have been necessary for her to reserve
17 the life use?

18 A Perhaps, she would have wanted to preserve the
19 life use.

20 MR. IMBERMAN: If Your Honor please, I think
21 counsel is now arguing with the witness.

22 THE WITNESS: Look, nothing is -- nothing is
23 necessary.

24 MR. PHALIN: Your Honor, if I may have one more
25 question.

1 THE COURT: Yes.

2 MR. PHALIN: And I think it will --

3 THE COURT: Very well.

4 MR. PHALIN: -- make the area relevant. Isn't
5 it true that if one receives outright ownership of
6 property pursuant to a Will, that once that interest
7 vests, the person can do whatever they wish with it --
8 they can then carve out the life estate on their own and
9 leave the remainder to whomsoever they choose?

10 A Yes, that's true.

11 MR. IMBERMAN: I object on the grounds that it's
12 argumentative, if Your Honor please, and totally irrelevant.
13 It's improper cross.

14 THE COURT: Well, the question has been answer.

15 THE WITNESS: And the answer is -- yes, that
16 is true.

17 MR. PHALIN: Then why wasn't -- why couldn't
18 this have been done? What was the great concern here
19 that got you into this state -- this problem in New York
20 State law?

21 MR. IMBERMAN: If Your Honor please, I think the
22 witness has answered he was following the instructions
23 he was given and what counsel is now trying to do is argue
24 with the witness as to why he did something -- in accordance
25 with his instructions.

1 THE COURT: Well, I'll allow him to answer the
2 question.

3 THE WITNESS: Would you restate it, please?

4 MR. PHALIN: If, in fact, the wife could have
5 taken the collection outright and then if she so desired,
6 carved out the life estate and left the remainder to whomso-
7 ever she chose -- why was there such a problem concerning
8 how to draft the Will?

9 A The -- my recollection is -- at the time that
10 this Will was being prepared -- her health was precarious.
11 If this had been left -- from the way this is set up --
12 she could have gotten the life estate, have been well
13 enough to take it down somewhere -- but -- and this is
14 only on recollection -- this would have provided her
15 enjoyment since the basic thing -- the first thing she
16 got was the life estate with the remainder going over to
17 charity. So that she would have had the life use of this
18 property with remainder to charity if she were not in a
19 posture to disclaim the life use and take it all. That
20 is my recollection. I would be happy to try and bolster
21 it by a search of my files but that's my recollection.

22 Q What do you have, Mr. Lustgarten, by the way of
23 files with respect to the drafting of this Will?

24 A For every client there is a Will file -- in that
25 Will file would be such memoranda and correspondence as

1 relates to that particular client.

2 Q And that file is still in existence?

3 A As far as I know.

4 Q At this time. Your Honor, I would ask that that
5 file be produced and the respondent be given an opportunity
6 to review it and the record left open to resume cross-
7 examination of the witness, if necessary.

8 MR. IMBERMAN: If Your Honor please, I have the
9 same objection with regard to counsel rummaging through
10 our files. But if there is a memoranda that the witness
11 made with regard to the drafting of the Will or if there
12 are letters that he wrote to the decedent -- those we
13 would be glad to produce.

14 THE COURT: Very well. They will be produced
15 and made available to counsel.

16 MR. IMBERMAN: Yes, sir.

17 THE COURT: Very well. Suppose we take just a
18 brief recess here for the reporter to change the tape.

(Recess)

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22

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AFTERNOON SESSION

2:00 P.M.

THE CLERK: Be seated. The Court is now in session.

MR. IMBERMAN: If Your Honor please, at the time we adjourned, Mr. Lustgarten was on the stand. And I'm not sure whether the respondent's counsel is through with his cross-examination of Mr. Lustgarten or whether he still wants to cross-examine. It seems to me if he still wants to cross-examine, perhaps, we ought to put Mr. Lustgarten back on the stand.

MR. PHALIN: Your Honor, the respondent intends to complete cross-examination as to both witnesses -- which goes first is really immaterial.

THE COURT: Does it matter to you?

MR. IMBERMAN: No, I was just thinking of how the record is going to look.

THE COURT: Well, suppose we get the other witness then and take his testimony -- complete his testimony and then we'll bring this witness back to the stand.

MR. IMBERMAN: Okay.

THE COURT: You may proceed.

MR. PHALIN: Your Honor, I would like to state for the record that during our recess, the respondent has been supplied with fourteen separate documents from the

1 petitioners files -- office files -- relating to the
2 drafting of the Will here in question.

3 MR. IMBERMAN: I think the documents speak for
4 themselves, Your Honor. I tried to give counsel whatever
5 I thought was reasonably relevant.

6 THE COURT: Very well.

7 MR. PHALIN: At this time, Your Honor, the
8 respondent would like the following two documents marked
9 for identification -- Exhibits B and C respectively for
10 identification.

11 THE CLERK: Your Honor, Respondent's Exhibits
12 B and C are marked for identification.

13 THE COURT: Very well.

14 MR. PHALIN: I am now furnishing petitioner's
15 counsel copies of Exhibits B and C for identification.

16 MR. IMBERMAN: Which is which?

17 MR. PHALIN: The document dated June 8, 1967,
18 is Exhibit B and the document dated June 9, 1967, is
19 Exhibit C.

20 IRA LUSTGARTEN (resumed)

21 CROSS EXAMINATION

22 BY MR. PHALIN (continued)

23 Q Mr. Lustgarten, I place before you Exhibit B
24 and C for identification. Would you please identify them
25 for the Court.

1 A Exhibit B, I take it, yes, Exhibit B is a memoran-
2 dum dated June 8, 1967, Re: Ludwig Neugass - Will to Mr.
3 Rosenberg from me showing cc: Mr. Looker. It has my
4 initials in the upper left hand corner and the initials
5 of the woman who was then my secretary.

6 Q And that's as to both documents?

7 A I'm sorry. Exhibit C is a memorandum dated
8 June 9, 1967, Re: Ludwig Neugass - Will, to Mr. Rosenberg
9 from me, again it has my initials and my secretary's initials
10 in the upper left hand corner.

11 Q Now if you would please, would you read over
12 the contents of those documents to yourself.

13 A All right.

14 Q Now, Mr. Lustgarten, those two documents are the
15 only two documents furnished to respondent which bear
16 your name. Do you have any recollection of having prepared
17 any other written memoranda relevant to your preparation
18 and drafting of the Will of the testator?

19 A No, I don't. Are those the only -- I accepted
20 those are the only ones that bear my name, but I have no
21 recollection that those are the only ones.

22 Q Specifically, do you have any recollection of
23 having prepared a written memorandum discussing the
24 rather complex legal problem under New York State law
25 to which you testified at some length earlier this morning.

1 MR. IMBERMAN I object to the form of the
2 question, if Your Honor please.

3 THE COURT: I'll overrule the objection. The
4 answer is --

5 THE WITNESS: I have no such recollection.

6 MR. PHALIN: Do you have any recollection of
7 having prepared a written memorandum with reference to
8 whether or not the provisions of Article 5th of the drafted
9 Will would comply with the requirements for the marital
10 deduction under Federal estate tax law?

11 A I have no such recollection.

12 Q Mr. Lustgarten, do you recall whether or not
13 you received any written instructions from Mr. Rosenberg
14 as to how you were to draft the testator's Will?

15 A I know that there was a memorandum -- I don't
16 think it was addressed to me. I know that I, undoubtedly,
17 saw that memorandum. I don't know whether it was given to
18 me by him or given to me by somebody else.

19 Q At this time, Your Honor, I wish to have the
20 following document marked for identification as Respondent's
21 Exhibit D for identification. I am now furnishing the
22 petitioner's counsel with a copy of Respondent's Exhibit D
23 for identification.

24 *** THE CLERK: Your Honor, Respondent's Exhibit D
25 is marked for identification.

1 THE COURT: ery well.

2 MR. PHALIN: Mr. Lustgarten, I have now placed
3 before you Respondent's Exhibit D for identification. Would
4 you please identify it for the record.

5 A This is a memorandum dated May 11, 1967, pardon
6 me, from Mr. Rosenberg to Mr. P. J. Hirsh with copies show
7 to Mr. W. H. Freedman -- it bears Mr. Rosenberg's initials
8 and another set of initials that I can't identify in the
9 upper left hand corner.

10 Q Would you now please read over to yourself the
11 contents of that memorandum? Now, sir, can you recall
12 whether this is, in fact, a memorandum in which you took
13 your instructions as to how to draft the testator's Will?

14 A I have no specific recollection. I would assume
15 that it was.

16 Q Do you have any reason to believe that there
17 would have been another memorandum?

18 A No, I do not.

19 Q Thank you. At this time, Your Honor, the
20 respondent would ask that Respondent's Exhibits B and C
21 for identification be received in evidence as Respondent's
22 Exhibits B and C.

23 THE COURT: There being no objection, Exhibits
24 B and C are in evidence.

25 MR. PHALIN: I have no further cross-examination

1 Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. IMBERMAN:

4 Q Do you have the exhibits in front of you, Mister--

5 A I have Exhibit D in front of me, but not B or C.

6 Q What about B and C?

7 A No, I do not.

8 Q Look at Exhibit B, Mr. Lustgarten. Can you
9 identify for us the current Will that is referred to in
10 the first line?

11 A The current Will was the Will which Mr. Neugass had
12 which had been prepared by his former attorneys and we had
13 a copy of that.

14 Q Did you have that current Will on June 8, 1967,
15 when you wrote this memorandum -- Exhibit B?

16 A I must have.

17 Q Do you recall what that Will provided for with
18 respect to a marital deduction?

19 MR. PHALIN: Objection, Your Honor, this calls
20 for hearsay.

21 THE COURT: Well.

22 MR. PHALIN: Apparently the other Will is in the
23 file someplace, Your Honor, if they want to introduce it,
24 that would be fine.

25 THE COURT: I'm going to overrule the objection.

1 THE WITNESS: My recollection was that it provided
2 for an outright bequest of personal and household effects
3 including works of art to the spouse and that there was
4 as the residuary estate -- a formula marital deduction,
5 I don't recall whether it was an outright or in trust --
6 and as to the second half of the residuary estate, I really
7 don't remember what the Will provided.

8 MR. IMBERMAN: Now look at Exhibit C, please.
9 Which is your memorandum dated June 9th. And that reads
10 and I quote "pending a decision on the residuary estate, you
11 might consider the first five articles of the Will as set
12 forth in the accompanying draft". What does that mean --
13 pending a decision on the residuary estate?

14 A Well, in the June 8th memorandum, I had --
15 in the art --

16 Q Which is Exhibit D as in David?

17 A Okay, Exhibit D --

18 Q Yes.

19 A -- had said "attached is a copy of his Will --
20 the basic plan and the Will is satisfactory" and then showed
21 some changes. What I said on June 8th was that the
22 current Will does not provide what happens to the second
23 half of the residuary estate if Mrs. Neugass survives,
24 meaning survives the testator, that Nancy who is the
25 testator's daughter, predeceases, leaving no descendants.

1 And so that question was unresolved. I then said that
2 there was a remote contingency provision that anything
3 undisposed of by the Will was to go to his distributees.
4 And that under New York law -- or that is short-cutting
5 what this says -- I said that this would mean that Mrs.
6 Neugass gets the second half outright -- is this desired?
7 Anyway, apparently as close as I can reconstruct this --
8 there was some question as to the disposition of the resid-
9 uary estate in the event that the daughter predeceased the
10 wife, leaving no descendants. Then on June 9th, I wrote
11 a memorandum that you have just quoted -- setting forth
12 the first five articles which were having to do with the
13 disposition of personal and household effects -- paying
14 debts and so on and some legacies -- the Article 5th that
15 we have been discussing all morning, but stopping short
16 of the disposition of the residuary estate. So that's
17 what was referred to in the -- in Exhibit C.

18 Q Your Honor, could we approach the bench a moment?

19 THE COURT: Yes.

20 (Off the record)

21 MR. IMBERMAN: I have no further questions.

22 THE COURT: You may step down.

23 MR. IMBERMAN: Is the witness excused, Your
24 Honor?

25 THE COURT: Yes, will there be a further need of

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1 this witness?

2 MR. PHALIN: I beg your pardon, sir?

3 THE COURT: Will there be any further need of
4 this witness?

5 MR. PHALIN: No. No, Your Honor.

6 THE COURT: You may be excused from further
7 attendance in the trial.

8 THE WITNESS: May I sit in the courtroom?

9 THE COURT: Yes, you may.

10 (Witness excused)

11 MR. IMBERSON: Has D actually been in evidence?

12 MR. PHALIN: Just for identification.

13 THE COURT: It has not been offered.

14 MR. IMBERSON: May I suggest that if you intend
15 to offer it, Mr. Phalin, that we offer another copy with
16 paragraph 4 excised?

17 MR. PHALIN: I do intend it to offer it at the
18 appropriate time. I don't know how I can directly at
19 this time.

20 THE COURT: Well, may I suggest that you have
21 someone in your office go and Xerox the second page in
22 the manner that we have agreed upon. And substitute that
23 second page.

24 MR. PHALIN: It will be done, Your Honor.

25 THE COURT: Very well. Now -- do you wish --

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1 MR. IMBERMAN Do you want Mr. Rosenberg now?

2 MR. PHALIN: Yes, if we could have Mr. Rosenberg--
3 to the stand, Your Honor.

4 THE COURT: Very well.

5 MR. PHALIN: At this time, Your Honor, the
6 respondent requests that the following three documents
7 be marked as Respondent's Exhibits E, F, and G for
8 identification. And I am now giving petitioner's counsel
9 copies of Respondent's Exhibits marked for identification
10 as E, F, and G respectively.

11 MR. IMBERMAN: Could you tell me which is which?

12 MR. PHALIN: They are in order. The document
13 dated June 16, 1967 is Exhibit E for identification.
14 The document dated July 6, 1967, is F for identification
15 and document dated July 7, 1967 is Exhibit G for identifi-
16 cation.

17 THE CLERK: Your Honor, Respondent's Exhibits
18 E, F, and G are all marked for identification.

19 THE COURT: Very well.

20 MR. PHALIN: Your Honor, may I proceed to refer
21 to Exhibit D for identification at the present moment?

22 THE COURT: Yes, you may.

23 ALAN ROSENBERG,
24 recalled as a witness, having been previously sworn,
25 took the stand and testified further as follows:

1 CROSS EXAMINATION

2 BY MR. ROSENBERG:

3 Q Mr. Rosenberg, I place before you Respondent's
4 Exhibit D for identification -- has been earlier identified
5 as a memorandum written by yourself. Do you recognize it
6 as such?

7 A Yes.

8 Q Would you please familiarize yourself with the
9 contents of it, please? Now, Mr. Rosenberg, may I ask you
10 -- is that -- is a memorandum marked as Exhibit D for identi-
11 fication. Is that, in fact, your memorandum of your initial
12 interview with the testator concerning his Will?

13 A I believe so. I can't be sure but I believe
14 it is.

15 Q Does it not state that you met with him that
16 very morning?

17 A Yes, it does. It says he is a new client of
18 mine. It is conceivable that I had met him before but
19 I really don't recall.

20 Q If you had had prior conferences with him,
21 wouldn't there be memorandums on that?

22 A If they're not in the file, there would not be.

23 Q Do you have any recollection of having written
24 any other memorandums of interviews --

25 A No.

Q -- other than the present one?

1 A No.

2 Q You testified earlier this morning that you
3 -- your recollection was that you had met with the testator
4 two to four times in your offices in regard to the drafting
5 of the Will. Would it be more correct to say now that you
6 met with him once?

7 A No, I couldn't say that I met with him once
8 because you've got to remember that the procedure of --
9 in connection with an estate plan is -- you meet and you
10 may have phone conversations and you may have other meetings.
11 Not all of which would be a memoranda.

12 Q I understand that, but I am referring to face-
13 to-face contact in your offices.

14 A I could not say whether there was more than
15 one or not. I would really have to review time sheets
16 in order to determine that. I also visited the decedent
17 at his home.

18 Q Did you make a memorandum of that visit?

19 A No, I did not.

20 Q Was it in respect to the drafting of his Will?

21 A I could not tell you that either because -- you
22 know within a period of time, I was seeing him -- I went
23 up to his home, I saw him in the office -- I did not
24 remember the precise content of each meeting at this time.

25 Q If I may have Respondent's Exhibits E, F, and G

1 for identification. O.K., thank you. Mr. Rosenberg, I
2 place before you Respondent's Exhibits E, F, and G for
3 identification. I am wondering if you might identify
4 them for the record.

5 A E is a letter of June 16th to Mr. Neugass forward-
6 ing to him a copy of a draft of his Will.

7 Q Thank you. And the next exhibit? E, I believe,
8 for identification. Or F rather.

9 A F is a memorandum to our accounting department
10 enclosing the original Wills and the conformed copies
11 for filing the original Will in our firm vault and
12 describing that conformed copies were sent to the executors
13 who were named in the Will.

14 Q Now does that memorandum state on which date
15 the Will was executed.

16 A Yes, July 6th.

17 Q Thank you. Would you please identify Exhibit G
18 for identification?

19 A G is a letter to Mr. Neugass dated July 7th
20 which forwards to him a conformed copy of the new Will
21 and -- certain other documents which described.

22 Q Thank you. Now, Mr. Rosenberg, earlier this
23 morning you testified that prior to your testimony on
24 direct, you had refreshed your memory by reviewing your
25 legal file and memorandums and correspondence concerning

1 your contacts with the testator.

2 A I think that I said I had reviewed the memos.
3 I do not think I said I reviewed the correspondence.

4 Q So I ask you now, did you review any documents
5 other than those before you -- the four documents you
6 have in front of you.

7 A Well, I -- I looked through all the memoranda
8 in the file so I looked at all of the memoranda in our
9 file. This is the only one that I believe related to the
10 testimony this morning.

11 Q Do you have any recollection of their being
12 other -- relatively pertinent documents --

13 A No.

14 Q -- that you used. Just those four?

15 A This -- this memorandum of May 11th is what I
16 looked at.

17 Q That was the main source of your --

18 A That was the main source of my -- of the file
19 information that I had.

20 Q Now with respect to your instructions to Mr.
21 Lustgarten as to how the Will should be drafted -- did
22 you not send him written instructions?

23 MR. IMBERMAN: Objection, if Your Honor please.
24 I think that's a misquotation of the witnesses testimony.
25 I don't think he said he ever instructed Mr. Lustgarten

1 how to draw up the Will'.

2 THE COURT: Well, would you rephrase the question.

3 MR. PHALIN: Whom did you instruct to draft the
4 testator's Will?

5 A Well, I really didn't instruct anyone. At that
6 time I was an associate in the firm and I sent this memo-
7 randum which is directed to a partner in the estates
8 department. I would not be the one who would determine.
9 At that time I would not have been the one who would have
10 drafted the Will.

11 Q Did you issue any other written instructions
12 concerning the drafting of the Will?

13 A No, I did not.

14 Q Do you know of any other written instructions
15 that were issued concerning the drafting of the Will?

16 A No.

17 Q At this time, Your Honor, the respondent would
18 ask that the Respondent's Exhibits D, E, F, and G for
19 identification be received in evidence as Respondent's
20 Exhibits D, E, F, and G with the understanding that
21 Exhibit D will be corrected.

22 THE COURT: We have the substitute copies of
23 Exhibit D at this time. Suppose we return the copies
24 of the instrument as originally used to the counsel for
25 the petitioner.

1 MR. PHALIN: Again then, Your Honor, the respon-
2 dent would ask that Exhibits D, E, F, and G for identifi-
3 cation be received in evidence as Respondent's Exhibit
4 D, E, F, and G.

*** 5 THE COURT: They will be admitted.

6 MR. PHALIN: I have no further cross-examination
7 of the witness, Your Honor.

8 THE COURT: Is there redirect?

9 MR. IMBERMAN: May I just have a minute, Your
10 Honor.

11 REDIRECT EXAMINATION

12 BY MR. IMBERMAN:

13 Q Mr. Rosenberg, in addition to what may be memor-
14 ialized in the memoranda that are in evidence D, E, F, and
15 G -- is it true that there were conference between you
16 and people in the office with respect to the drafting
17 of this will which are not recorded in any memoranda?

18 A Yes.

19 Q That is your present recollection?

20 A Yes.

21 Q And it is also true that there were discussions
22 between you and the decedent concerning his Will at the
23 May 11, 1967, which are not recorded in any memoranda?

24 A That is correct.

25 Q And is it also true that the Will as signed by

1 the decedent was the result of the various conferences
2 which you had both with him and with people in the office?

3 A That's correct.

4 Q No further questions.

5 THE COURT: You may step down.

6 THE WITNESS: Thank you.

7 (Witness excused)

8 THE COURT: Does this complete the testimony in
9 the case?

10 MR. IMBERMAN: Yes, Your Honor, I have no further
11 witnesses.

12 MR. PHALIN: The respondent rests, Your Honor.

13 MR. IMBERMAN: I rest.

14 THE COURT: Gentlemen, we have some questions
15 here which are not easy questions. I would appreciate
16 receiving briefs. Do you gentlemen have any suggestions
17 as to whether the briefs be seriatim briefs or simultaneous
18 briefs?

19 MR. PHALIN: Your Honor, in light of the fact
20 that respondent is still rather uncertain as to precisely
21 what legal arguments the petitioners intend to make. It
22 might be helpful to the respondent if the Court could
23 assign seriatim briefs.

24 MR. IMBERMAN: I'm not here as an appellate
25 Your Honor, so that I have to file my brief first. It

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1 seems to me the proper procedure would be for both sides
2 to file briefs within the date designated by Your Honor
3 and then both sides can file reply briefs within a date
4 designated by Your Honor. That would be fair to both
5 of us.

6 THE COURT: All right, we will have simultaneous
7 briefs then.

8 MR. IMBERMAN: Yes.

9 THE COURT: Do you have requests as to the dates?
10 The normal --

11 MR. IMBERMAN: 45 days with the exchange of
12 original briefs in 30 days after that, Your Honor, and
13 the reply briefs. Is that customary?

14 THE COURT: Yes, would you give us those dates,
15 Mr. Parker?

16 THE CLERK: The original briefs would be March
17 10, 1975, Your Honor, and the reply briefs would be April
18 8, 1975.

19 THE COURT: Very well. Anything further before
20 we close the record in the case?

21 MR. IMBERMAN: I assume these briefs will be
22 exchanged.

23 THE COURT: Yes.

24 MR. IMBERMAN: I, now --

25 THE COURT: The rules --

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1 MR. IMBERMAN: -- is the filing to be on April
2 8th of both briefs, Your Honor. Or should Your Honor
3 receive the initial briefs when they are exchanged? What
4 is your preference?

5 THE COURT: Well, the rules provide that the
6 briefs may be served on the parties by one another. And
7 I have no feeling about that one way or the other. I
8 suppose that the practice is for the chief counsel to
9 file the briefs in Washington and I believe the Court
10 would ordinarily serves the original briefs. Is that
11 correct?

12 MR. IMBERMAN: That is correct, Your Honor.

13 THE COURT: So you may handle it either way you
14 prefer.

15 MR. IMBERMAN: Thank you, Your Honor, I'll
16 consult with counsel.

17 THE COURT: You may serve the counsel locally
18 or you may send them to the Clerk in Washington and the
19 Clerk will serve them if you do that.

20 MR. IMBERMAN: Very well, sir.

21 THE COURT: Very well, on this basis the case
22 will be submitted.

23 MR. IMBERMAN: Thank you, Your Honor.

24 MR. PHALIN: Thank you, Your Honor.

25 THE COURT: The --

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1 THE CLERK: 11 rise.

2 (Whereupon the case was adjourned at 2:47 P.M. as
3 described above.)

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UNITED STATES TAX COURT
Certificate of Transcriber

Docket No. 4734-73Name: ~~Estate of Ludwig Neugass, et al~~

The foregoing pages, numbers 1 through 80
inclusive, are the true, accurate and complete transcript
prepared from the verbal recording made by electronic recording
by Donna Dickert on January 23, 1975
in the United States Tax Court located in ~~New York,~~
New York, in accordance with the applicable
provisions of the current reporting contract of the Court
under which I have performed my duties as transcriber.

Ann Johns
(Name)

~~January 23, 1975~~
(Date)

Findings of Fact and Opinion by
Hon. C. Moxley Featherston

65 T. C. No. 17

UNITED STATES TAX COURT

ESTATE OF LUDWIG NEUGASS, deceased, HERBERT
MARX, JACQUES COE, JR. and CHASE MANHATTAN
BANK, N.A., Executors, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4734-73.

Filed October 29, 1975.

Decedent's will gave to his surviving spouse and daughter successive life estates in his art collection and the remainder interest therein to a foundation. The will further provided that, within 6 months after the date of his death, his surviving spouse could elect to take absolute ownership of any item in the collection. Within the 6-month period, the surviving spouse elected to take absolute ownership of certain items, and the estate included their value in its computation of the marital deduction.

Held, the surviving spouse was given a terminable interest in the items of which she took absolute ownership and their value may not be taken into account in computing the marital deduction allowed by sec. 2056 (a), I.R.C. of 1954.

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Findings of Fact and Opinion

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Jacob Imberman, Alan S. Rosenberg, and Lawrence J. Rothenberg, for the petitioners.

Michael K. Phalin, for the respondent.

FEATHERSTON, Judge: Respondent determined a deficiency in petitioners' Federal estate tax in the amount of \$249,231.31. Concessions having been made, the only remaining issue is whether petitioners are entitled to a marital deduction under section 2056(a) ^{1/} for the value of certain works of art which decedent's surviving spouse received under the terms of decedent's will.

FINDINGS OF FACT

Ludwig Neugass (hereinafter decedent) died testate on February 24, 1969, a domiciliary of New York, New York, survived by his wife, Carolyn, and his daughter, Nancy Carouso (hereinafter Nancy), and two grandchildren. Herbert Marx, Jacques Coe, Jr., and Chase Manhattan Bank, N.A., were issued letters testamentary by the Surrogate's Court, New

^{1/} All section references are to the Internal Revenue Code of 1954, as in effect at the time of decedent's death, unless otherwise noted.

York County, New York (hereinafter Surrogate's Court). As of the date they filed the petition herein, the executors' principal office was located in New York, New York.

Decedent's last will and testament was admitted to probate on April 3, 1969, in the Surrogate's Court. It contained the following provisions:

FIFTH: I direct that if my wife, CAROLYN NEUGASS, survives me, she shall have the life use of all my paintings and other works of art (hereinafter called my "collection"), without bond, and that upon her death my daughter, NANCY CAROUSO, if she is then living, shall have the life use of said collection, without bond. Upon the death of the survivor of my wife and my daughter, said collection shall become the absolute property of the LUDWIG NEUGASS FOUNDATION.

Neither my wife nor my daughter shall be under any duty to insure said collection or any item therein, but if the FOUNDATION shall elect so to insure the proceeds received upon any loss shall become the absolute property of the FOUNDATION, (free of the life use of either my wife or my daughter).

With respect to any item in said collection:

(a) Within six months after the date of my death, either my wife or my daughter may renounce her life use thereof and, if both of them so renounce, the item shall become the absolute property of the FOUNDATION.

(b) Within six months after the date of my death, either my wife or my daughter may elect to take absolute ownership of any item, whereupon said item shall become the absolute

property of my wife or my daughter; in the case of my daughter, such election shall take effect if and only when her life use has begun.

(c) At any time after said six months period either my wife or my daughter may terminate her life use of any item and thus accelerate with respect to said item the provisions otherwise effective upon her death.

On July 2, 1969, pursuant to Article FIFTH of decedent's will, Carolyn Neugass executed and filed with the Surrogate's Court two documents in notarized form. One, denominated "Election Pursuant to Article Fifth (b) of the Will of Ludwig Neugass," provided as follows:

WHEREAS, under the terms of Article FIFTH of the Will of LUDWIG NEUGASS, deceased, said decedent bequeathed to his wife, CAROLYN NEUGASS, the life use of all of his paintings and other works of art; and

WHEREAS, under the terms of Article FIFTH (b) of said Will, his wife may within six months after the date of said decedent's death, elect to take absolute ownership of any item of his paintings and other works of art, whereupon said item shall become her absolute property.

NOW, THEREFORE, the undersigned, does hereby elect to take absolute ownership of the items of paintings and other works of art of the decedent listed on Schedule A annexed hereto.

Dated: July 2, 1969

/s/ Carolyn Neugass
CAROLYN NEUGASS

The other instrument entitled, "Renunciation Pursuant to Article Fifth (a) of the Will of Ludwig Neugass," reads as follows:

WHEREAS, under the terms of Article FIFTH of the Will of LUDWIG NEUGASS, deceased, said decedent bequeathed to his wife, CAROLYN NEUGASS, the life use of all of his paintings and other works of art; and

WHEREAS, under the terms of Article FIFTH (a) of said Will, his wife may within six months after the date of said decedent's death, renounce her life use of any item of his paintings and other works of art.

NOW, THEREFORE, the undersigned, does hereby renounce her life use of the items of paintings and other works of art of the decedent listed on Schedule A annexed hereto, thereby commencing the life use of NANCY CAROUSO, to begin upon the execution of this instrument.

Dated: July 2, 1969.

/s/ Carolyn Neugass
CAROLYN NEUGASS

On May 22, 1970, the executors filed a Federal estate tax return with the District Director of Internal Revenue at Manhattan, New York, claiming a marital deduction of \$642,908.97, which included the value of the artworks of which decedent's spouse elected to take absolute ownership.

In the notice of deficiency, respondent disallowed \$337,329.88 of the claimed marital deduction, representing

the value of the works of art in which Carolyn Neugass elected to take absolute title. Such disallowance was based on respondent's determination that "the interest of the surviving spouse is a terminable interest as defined in Section 2056 of the Internal Revenue Code."

OPINION

Section 2056 allows a deduction not to exceed 50 percent of the decedent's adjusted gross estate for the value of any interest in property which "passes or has passed" from the decedent "to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate." This general rule is qualified in several respects. One qualification, section 2056(b)(1), ^{2/} provides that no marital deduction

2/ SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(b) Limitation in the Case of Life Estate or Other Terminable Interest.--

(1) General rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing

continued

will be accorded a "terminable interest." The definition of that term has been concisely summarized in Allen v. United States, 359 F.2d 151, 154 (2d Cir. 1966), cert. denied 385 U.S. 832 (1966), as follows:

Footnote 2--continued:

to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))--

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

* * *

A terminable interest is defined, in general, as one which possesses the three characteristics found in sections 2056(b)(1)(A) and (B). First, it must be an interest in property which will terminate upon the occurrence or non-occurrence of an event or upon the lapse of time. Second, another interest in the same property must pass or have passed to someone other than the spouse from the decedent for less than an adequate consideration. And third, such other person must be able to possess or enjoy a part of such property upon the termination of the spouse's interest. With certain exceptions not relevant to this case, the interest bequeathed to a spouse qualifies for the marital deduction unless all three of these characteristics are present.

It is now well settled that the determination of whether an interest is terminable is to be judged in the light of events at the precise moment of the decedent's death. * * * [Fn. ref. omitted.]

The first sentence of Article FIFTH of decedent's will gave Mrs. Neugass only a life estate in decedent's art collection, and such an estate clearly is a terminable interest. Sec. 20.2056(b)-1(b), Estate Tax Regs. At the moment of decedent's death, Mrs. Neugass had not made her election to take absolute ownership of any items in the art collection. The bequest, therefore, is a terminable interest and does not qualify for the marital deduction.

Petitioners contend, however, that the first sentence of Article FIFTH and Article FIFTH (b) are alternative provisions which authorized Mrs. Neugass to elect to take

a life estate or absolute ownership of any or all items in decedent's art collection. They maintain that, pursuant to Article FIFTH (b), Mrs. Neugass elected to take absolute ownership of selected items, and that her election relates back to decedent's death. On this ground, petitioners argue that her interest in those items was not a terminable one and the value thereof may be taken into account in computing the marital deduction. To support their position, petitioners cite Estate of George C. Mackie, 64 T.C. 308 (1975). We do not agree.

The first sentence of Article FIFTH gave Mrs. Neugass and Nancy successive life estates in decedent's art collection. No action was required to put that provision into effect. It took effect as a result of Mrs. Neugass' surviving decedent. At the time she elected to take absolute ownership of the selected items, on July 2, 1969, nearly 5 months after decedent's death, she already had a life estate in decedent's entire art collection. 3/

3/ A renunciation by Mrs. Neugass of her life interest in any items in the art collection would have related back to the date of decedent's death, but, also, would have caused the commencement of Nancy's life interest. Petitioners so interpreted the will in the renunciation document, quoted in our Findings. See also Article FIFTH (c). Such a renunciation would have terminated her power to take absolute ownership of the renounced items.

Indeed, the provisions of Article FIFTH (b), empowering Nancy or Mrs. Neugass to take absolute ownership of any item, contemplate that they could do so only in respect of property in which she already held a life use. In Nancy's case, the article expressly provides that her election shall take effect "if and only when her life use has begun." No such express condition appears in the will in respect of Mrs. Neugass, but that condition is implicit in the first sentence of Article FIFTH giving her the life use of the art collection, without any action on her part, if she "survives" the decedent. The renunciation document, quoted in our Findings, interpreted the will to provide that upon Mrs. Neugass' renunciation of her life use of any item,^{4/} Nancy's life estate shall commence. Consistently, the election document, also quoted in our Findings, contains no renunciation of Mrs. Neugass' life estate in the paintings and other artworks of which she took absolute ownership. Rather, it refers to the bequest to her of the life use of the art collection, to Article FIFTH (b) permitting her to

^{4/} "A disclaimer or renunciation of a general power of appointment" is not considered to be a transfer subject to the gift tax provisions of the Code. Sec. 25.2514-3(c)(5), Gift Tax Regs.

elect to take absolute ownership of any item, and her election to take absolute ownership of the items listed on the attached schedule.

Since Mrs. Neugass already had a life estate in decedent's art collection, she merely enlarged her existing interest when she took absolute ownership of the selected items. In these circumstances, Mrs. Neugass' right to "elect" absolute ownership of items in decedent's art collection was not an alternative to her life estate, but was a power to enlarge her existing interest to give herself absolute ownership of the selected items. Such power was a power to appoint to herself. ^{5/} Her exercise of that

^{5/} Although requested specifically to brief the point under New York law, the parties have cited no New York cases defining the legal standards for distinguishing a bequest of a life estate plus a power of appointment from a bequest giving the beneficiary the right to choose between a life estate and absolute ownership. In Re Estate of Jacobsen, 306 N.Y.S.2d 290 (Surr. Ct. 1969) affd. 306 N.Y.S.2d 297 (Ct. App. 1969) and In Re Flyer's Will, 279 N.Y.S.2d 76 (Surr. Ct. 1967), are not apposite. We think the Prerogative Court's opinion in In Re Vanatta's Estate, 131 A. 515 (N.J. Pre. Ct. 1926), is distinguishable in that it was not clear in that case, as it is here, that the surviving spouse could elect to take absolute ownership only after her life interest had commenced. The court interpreted the will in that case to give the beneficiary a choice of two alternative bequests. For the reasons stated in the text, the instant will cannot be so interpreted.

power did not purport to relate back to decedent's death but was effective as of July 2, 1969, the date she executed and filed her election with the Surrogate's Court.

Section 2056(b)(5) ^{6/} provides that where a decedent passes by will a life estate to a surviving spouse with a

6/ Sec. 2056(b)(5) provides as follows:

(5) Life estate with power of appointment in surviving spouse.--In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse--

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

power in the spouse alone to appoint the entire interest either to himself or his estate, such life estate will qualify for the marital deduction as an exception to the terminable interest rule. Hoffman v. McGinnes, 277 F.2d 598 (3rd Cir. 1960); see also Estate of Opal v. Commissioner, 450 F.2d 1085, 1086-1087 (2d Cir. 1971), affg. 54 T.C. 154 (1970); Pipe's Estate v. Commissioner, 241 F.2d 210, 213 (2d Cir. 1957), affg. 23 T.C. 99 (1954), cert. denied 355 U.S. 814 (1957). This exception applies, however, only if such power is "exercisable by such spouse alone and in all events." Since Mrs. Neugass' "power" was required to be exercised within a period of 6 months after decedent's death, respondent contends that it was not exercisable "in all events." We agree. The following sentence in section 20.2056(b)-5(g)(3), Estate Tax Regs., is explicitly clear:

The power is not "exercisable in all events", if it can be terminated during the life of the surviving spouse by any event other than her complete exercise or release of it.

The bequest to Mrs. Neugass is, therefore, a terminable interest which does not qualify for the marital deduction.

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Findings of Fact and Opinion

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Secs. 20.2056(b)-5(a)(3) and (4), 20.2056(b)-5(g)(1)(i),
Estate Tax Regs. ^{7/}

We do not think Estate of George C. Mackie, supra, is apposite. In that case, the decedent bequeathed to his surviving spouse properties to be selected by her from the residue of his estate. The will provided that she could accept or reject the bequest, in whole or in part, by delivering a written election to decedent's executrix within 4 months of his death. Failure to make an election was to be deemed a rejection of the bequest. Within 4 months, she made the election. Applying the law of North Carolina, this Court held that the estate was entitled to the marital deduction for the bequest, concluding that the election related back to the date of the decedent's death and analogizing the case to those cases in which the surviving spouse may elect to take under the will or to take her statutory share. See Dougherty v. United States, 292 F.2d 331 (6th Cir. 1961); United States v. Crosby, 257 F.2d

^{7/} Treating a power to enlarge an existing interest from a life estate to absolute ownership as an alternative bequest, as petitioners seek to do, would effectively eliminate the provisions qualifying and limiting the general rule of sec. 2056(b)(5), such as the requirement that the power be exercisable "in all events."

515 (5th Cir. 1958); see also sec. 20.2056(e)(2), Estate Tax Regs.; cf. Allen v. United States, 359 F.2d 151 (2d Cir. 1966), cert. denied 385 U.S. 832 (1966)

In the instant case, Mrs. Neugass was not faced with a choice between alternatives, as was Mrs. Mackie. She was given a life estate without any strings attached to the bequest. She could take that bequest as given or she could enlarge it by electing to take absolute ownership of selected items. For the reasons stated, we think her right to elect to enlarge her life estate was not an alternative bequest but was a power to appoint the selected items to herself. 8/

8/ Petitioners offered oral testimony designed to show (1) decedent's desire to minimize estate taxes; (2) his concern for Mrs. Neugass' well-being and enjoyment of the art collection; and (3) the uncertain state of New York law at that time with respect to disclaimers of testamentary dispositions. We find nothing in this testimony to aid petitioners' case. The meaning of the words used in the will cannot be altered by some general ideas as to what decedent intended when he executed his will. The "draftsmen of testamentary instruments * * * [must] be meticulous in adhering to the formal requirements of section 2056." Allen v. United States, 359 F.2d 151, 153 (2d Cir. 1966), cert. denied 385 U.S. 832 (1966); see also Jackson v. United States, 376 U.S. 503, 511 (1964). For the reasons stated in the text, we do not think the words of decedent's will can be interpreted to meet those requirements.

Petitioners rely, next, upon the section 2056(d)(1) ^{9/} exception to the general rule disqualifying life estates for the marital deduction. That section provides that if a surviving spouse disclaims a property interest, such interest is deemed to pass, for marital deduction purposes, directly from the estate to the person entitled to receive it by virtue of the disclaimer. Petitioners contend that, by electing to take absolute ownership of the artworks selected pursuant to Article FIFTH (b) of decedent's will, Mrs. Neugass "disclaimed" the life estate in such property and as a result received an absolute fee in such property.

9/ Sec. 2056(d)(1) provides as follows:

(d) Disclaimers.--

(1) By surviving spouse.--If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

Accordingly, the argument goes, the selected artworks "passed" to her from decedent. ^{10/}

We think petitioners' reliance upon section 2056(d)(1) is misplaced. A disclaimer is a "disavowal, denial, or renunciation of an interest, right or property imputed to a person or alleged to be his." City Nat. Bank & Trust Co. of Columbus v. United States, 203 F.Supp. 398, 402 (S.D. Ohio 1962), affd. 312 F.2d 118 (6th Cir. 1963), cert. denied 373 U.S. 949 (1963). For section 2056(d)(1) to apply, the property must pass "to the person or persons entitled to

^{10/} In support, petitioners cite the following excerpt from S. Rept. No. 1013 (Part II), 80th Cong., 2d Sess. (1948), 1948-1 C.B. 285, 334:

* * * if the surviving spouse disclaims a bequest of the decedent to her and the property falls into the residue passing to other persons, no marital deduction is permitted with respect to such property. The property is considered as passing from the decedent to the residuary legatees. If, in such a case, however, the surviving spouse is the residuary legatee, the interest which she so disclaimed is considered as passing to her from the decedent (as a result of the disclaimer) for the purposes of the marital deduction.

However, as discussed in the text, had Mrs. Neugass merely disclaimed her life interest, she would have received nothing for Nancy's life use would have begun immediately.

receive the interest as a result of the disclaimer." (Emphasis added.) Grace M. Parker, 62 T.C. 192, 198 (1974); cf. Estate of Medora L. Salter, 63 T.C. 537, 545-546 (1975), on appeal (5th Cir. April 17, 1975). Had Mrs. Neugass merely disclaimed or renounced her life use of any item in the collection, she would have received no interest therein. Nancy's life interest in such item thereupon would have commenced. Mrs. Neugass did not become entitled to absolute ownership of decedent's artworks as a result of a disclaimer, but as a result of the exercise of the power conferred in terms of an election under Article FIFTH (b) of the will. ^{11/}

^{11/} Sec. 20.2056(e)-2(c), Estate Tax Regs., contains rules applicable if the surviving spouse may elect between a property interest offered her under the decedent's will and a property interest to which she is otherwise entitled, such as dower or other statutory share. Such an election relates back to decedent's death. Significantly, however, that section applies only to "a property interest to which she is otherwise entitled," not to a power to enlarge an interest from a life estate to absolute ownership. See Allen v. United States, 359 F.2d at 155.

Other bequests were made to Mrs. Neugass, and the notice of deficiency allows the estate a marital deduction of \$305,579.09. Petitioners do not contend that Mrs. Neugass, in electing to take absolute ownership of the several items of decedent's art collection,

continued

We are compelled to conclude that petitioners are not entitled to the disputed deduction.

Decision will be entered
under Rule 155.

Footnote 11--continued:

was exercising the right of election by a surviving spouse permitted by N.Y. Est., Powers & Trusts sec. 5-1.1(a)(1)(A) and (D) (McKinney 1967).

Decision by Hon. C. Moxley Featherston
UNITED STATES TAX COURT

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ESTATE OF LUDWIG NEUGASS, DECEASED,)
 HERBERT MARX, JACQUES COE, JR. and)
 CHASE MANHATTAN BANK, N.A., EXECUTORS,)

Petitioners,)

v.)

Docket No. 4734-73

COMMISSIONER OF INTERNAL REVENUE,)

Respondent.)

DECISION

Pursuant to the opinion of the Court filed October 29, 1975, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in estate tax due from the petitioners in the amount of \$109,079.42.

(Signed) C. Moxley Featherston

Judge.

Entered: JAN 22 1976

* * * * *

STIPULATION

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

/s/ Alan S. Rosenberg
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MEADE WHITAKER
Chief Counsel
Internal Revenue Service

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JUN 14 1963

Notice of Appeal
UNITED STATES TAX COURT

Washington, D.C.

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ESTATE OF LUDWIG NEUGASS, DECEASED, :
HERBERT MARX, JACQUES COE, JR. and :
CHASE MANHATTAN BANK, N.A., :
EXECUTORS, :

Petitioners, :

Docket No. 4734/1973

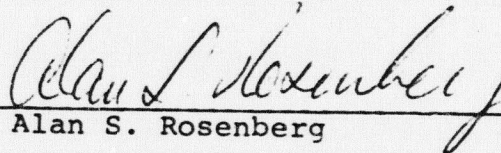
v. :

COMMISSIONER OF INTERNAL REVENUE, :

Respondent. :
-----x

NOTICE OF APPEAL

Notice is hereby given that the ESTATE OF LUDWIG NEUGASS, DECEASED, HERBERT MARX, JACQUES COE, JR. and CHASE MANHATTAN BANK, N.A., Executors, hereby appeal to the United States Court of Appeals for the Second Circuit from the decision of this court entered in the above-captioned proceeding on the 22nd day of January, 1976.


Alan S. Rosenberg

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